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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 127.

GRIFFITH D. NEAL, PLAINTIFF IN ERROR,

vs.

LANGHORNE SCRUGGS AND MANSEL T. SMITH, EX'ORS OF RICHARD JONES, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED SEPTEMBER 21, 1875.

Dec 15 1874
Brown
for Harlan

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a VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on Friday, the thirtieth day of April, 1875.

Be it remembered that heretofore, to wit, on the 21' day of October, 1871, came Langhorne Scruggs and Mansel T. Smith, executors of Richard Jones, deceased, and presented their petition to the honorable Joseph Christian, one of the judges of the supreme court of appeals, in the vacation of the court, for an appeal from, and supersedeas to, a decree pronounced by the circuit court of Pittsylvania County on the 7' day of June, 1871; which appeal and supersedeas was awarded; and the petition and record accompanying the same are in the words and figures following, to wit:

1 Court of appeals of Virginia. Richmond.

LUCK & ALS.
v.
CLARKE & ALS.

To their honors the judges of the supreme court of appeals of Virginia:

The petition of Langhorn Scruggs and Mansel T. Smith, executors of Richard Jones, dec'd, respectfully represents that they are greatly aggrieved by a final decree rendered by the circuit court of Pittsylvania, at the last May term of said court, in a suit in which W'm T. Clark and John W. Holland were plaintiffs, and your petitioners, etc., def'ts. A copy of the record of said suit is herewith presented, from which it will appear that the case is as follows:

William Fitzgerald, late of said county, died in the year 1857, having made his last will and testament, which was duly admitted to probate, soon after his death, in said county. Said testator appointed his brother, Edmund Fitzgerald, his executor, who duly qualified as such, with Sexton W. Smith and Sam'l Bradley as his sureties. The testator, by his will, directed his executor to sell all of his lands, and, after the payment of his debts, bequeathed his estate to his widow, Martha W. Fitzgerald, on certain conditions named in the will. Said widow, soon after the death of the testator, gave birth to a female child, named Martha W., and afterwards married Caddis B. Luck. In 1860, said Luck and wife instituted a suit in the court aforesaid against said executor and Martha W. Fitzgerald, to recover from the executor the legacy bequeathed to said Martha W., the widow of testator, and in that bill it is alleged that the said executor was, at the commencement of said suit, "a man of large property, and of undoubted solvency;" that, some time after the commencement of said suit and service of the process, said executor removed from Virginia to North Carolina, and thence to Mississippi, where he has ever since resided. After the commencement of that suit, and during the pendency thereof, the said Luck and wife sued out a bail writ against the said Edmund Fitzerald (the executor) requiring him to give bond in $10,000, with security on
2 affidavit, filed among the papers in said suit, and a part of the record thereof; and the plaintiffs in this suit in which an appeal is now asked (W'm T. Clark and John W. Holland) were sureties for said Luck on taking out said bail writ, and were fully informed of the said proceeding against the said executor. The said writ

was placed in the hands of the sheriff of Pittsylvania, who took an insolvent man as bail, and no steps have been taken by the legatees to hold the said sheriff or his sureties responsible for failing to take good and sufficient bail. After the said executor had entered into bond as aforesaid, with Sexton W. Smith and Sam'l Bradley as his sureties, they moved against him for other security, and the said plaintiffs (Clark and Holland) became his sureties in a new bond in the penalty of $34,000. In 1862 said executor was removed from his office, and the estate of said testator, with his will annexed, was committed to Coalman D. Bennett, since deceased. Bennett died in 1870, before the decree complained of was rendered, and no administrator was at the time when said decree was rendered living. At the October term of said court, 1867, a report was made by a commissioner of said court, showing a balance due from the executor to Luck and wife of $2,175 and $6,644.91 due said Martha W. Fitzgerald. Said Clark and Holland were then made parties to said suit last named, to subject them as sureties of said executor to the payment of the said sums ascertained by said report to be due from him, no part of which sums or of either of them has been paid by said Clark or Holland, nor is the ability of them or of either of them alleged or proved. Said executor, in the year '68, according to the provisions of the will, sold a portion of the land of his testator to Archer B. Womack, and another portion of said land, by a separate and distinct contract and at another time, to Raleigh White, since deceased. The bonds for the purchase-money of said lands were executed to said Edmund Fitzgerald as executor of his testator. Some time after said sales the said executor, being then in advance to the said estate about $1,400 or $1,500, and voluntarily, without any question being asked, stating that he was in advance of the estate to a much larger amount, sold two of the bonds executed to him as aforesaid to G. D. Neal at a discount, and assigned them to him by written assignment, endorsed on the backs of said bonds "for value received." Some two weeks after that time said Neal, in a separate and distinct contract, wholly unconnected with the contract between him and the executor, sold said bond' at a small discount to Richard Jones, the testator of your petitioners, at a price proved by the plaintiff's witness to be their full market value. No collusion, conspiracy, or combination between Neal and Jones is alleged, but the executor assigned said bonds as aforesaid to Neal, and he afterward sold and assigned and delivered them to Jones, each of said assignees paying fully the prices agreed on, and Neal delivered said bonds to Jones, who in his lifetime sued Womack and Adams, the obligors in said bonds, and recovered the money from them.

3 The plaintiffs, in 1869, filed their bill in said court making Neal & Jones, said White, Elisha Barksdale, j'r, &c., def'ts. Said bill is a cross-bill, an original bill, a bill quia timet, a bill to perpetuate testimony, praying the court to settle in that suit all the various transactions relating to the sales of all the bonds sold by the said executor to Neal and to White, though, as before stated, wholly unconnected, praying for the settlement of different and distinct accounts, and praying that the plaintiffs, as securities for said executor, whom, they allege, was "a man of undoubted solvency and large estate," (and without having paid a dollar as sureties for him,) may be substituted to the rights of said legatees of the testator, and that a decree may be rendered against your petitioners, executors of Jones, for the amount due from said executor, Edmund Fitzgerald. The plaintiffs, while making no direct charge of fraud against Jones in his purchase of said bond from Neal, state that Jones either knew or might have ascertained that the

sale of said bonds at a discount was not necessary at the time when it was made. Jones, in his lifetime, answered, denying every material allegation in the bill. The plaintiff took sundry depositions, and, so far from proving the allegations in the bill to be true and those in the answer to be false, established beyond controversy every statement in Jones' answer to be true and every allegation in the bill to be false and unfounded. There is no pretense that there is any conflict in the evidence; it is all on one side.

The circuit court, instead of permitting the assignment of the bonds to stand, and deciding that the assignees' consciences were charged by reason of their collusion with the executor, and holding them bound to the legatees as trustees of the money collected on the bonds, set aside both of said assignments, and yet does not disturb the payment of the bond made by the obligors to the assignee Jones. The obligors are not parties to the suit, and need not have been made parties if the decree had been a proper one, but are deeply interested if the assignments are set aside. Jones demurred to the bill in the form prescribed by the Code of 1860, p. 712, §30, 752, §1; but the court, on motion of the plaintiff's counsel, struck out the demurrer, at the same time giving leave to file "a more formal one," which leave was not asked for or accepted.

The suit in which the original decrees against the executor was obtained and the suit in which the decree complained of in this petition came on to be heard together; a copy of the record in the original suit is made an exhibit in the last-named suit, and will be found in the record presented with this petition. An injunction, prohibiting the plaintiff from enforcing said decree against defendant G. D. Neal, has been awarded by one of your honors, after having been denied by the judge of the circuit court aforesaid, and is now in full force.

Your petitioners are advised that said decree is erroneous, for the following reasons:

4 1. Because the demurrer was stricken out by the court. Code of 1860, p. 712, § 30; id., 752, § 1.

2. Because the bill is multifarious, and should have been dismissed by the court with or without a demurrer.

3. Because no combination, conspiracy, or collusion is alleged to have existed between Jones and Neal in relation to the assignments of said bonds in the petition mentioned, Jones being a remote assignee.

4. Because no direct and specific charge of fraud is made against Jones in the bill.

5. Because there is no allegation that any injury or loss was occasioned to the plaintiffs or to the legatees of W'm Fitzgerald by the purchase of the bonds assigned to him by Neal; a devastavit having been completed (if any was committed at all) by the sale and assignment by the executor to Neal and the payment of the money to the executor by Neal.

6. Because there is no allegation of the payment of any money by the plaintiffs, or either of them, or of their ability to pay, or of the insolvency of Edmund Fitzgerald, the former executor.

7. Because the bill shows that the legatees of W'm Fitzgerald have been guilty of gross neglect in failing to hold the said sheriff and his sureties liable for the failure of the sheriff to take good security on the bail writ aforesaid, in the petition mentioned. Hunter v. Lawrence, 11 Gratt., 111.

8. The plaintiffs have no equity against Jones, and if they have an equal equity Jones, having obtained judgment and recovered the money, has the legal advantage, and no decree should be rendered against

him in favor of the plaintiffs. Jones has paid his money and they have paid nothing. Hunter v. Lawrence, 14 Gratt.

9. If the plaintiffs have any equity against Jones, it is a latent equity, not existing between the original parties to the contract. An assignee takes a chose in action subject only to the equities of the obligor and assignor, and not to any latent equity of other persons. Norton v. Rose, 2d Wash., 233; Murray v. Lylburn, 2d Johns. Ch'y, 442; Moore v. Holcomb, 3 Leigh, 597; and this applies a fortiori to a remote assignee without notice.

10. If the demurrer was properly overruled, and the bill is not demurrable for any of the errors assigned, a decree should have been rendered for the def'ts, (Jones' executors,) because every material allegation of the bill is denied by his answer and that of his executors, and, so far from the allegations of the answer being disproved, the plaintiffs' evidence establishes them to be true.

11. Jones was a bona fide purchaser for value, without notice, and entitled to the protection of the court.

12. A decree having been rendered against Jones' executors, they are entitled to a decree over against Neal, the assignor of Jones, no collusion or combination having been alleged or proved between them, but the decree does not give Jones' executors any decree against Neal.

13. There is no pretence that Jones had actual notice of the fact that Edmund Fitzgerald intended to commit a devastavit by selling and assigning the bonds of Womack and Adams to Neal, and the decree must have proceeded on the ground of constructive notice.

14. Actual notice having been denied and disapproved, no case of constructive notice is made out; if Jones had suspected that Neal had bought at a discount, how could he have ascertained the fact that he had done so, and the further facts that the executor was not in advance of the estate, and that the state of the assets did not require the sale? If he had asked Neal he would not have disclosed the contract he made, (see his deposition on that subject;) the will would have afforded him no information; the accounts of the executor, settled by a comm'r, would have shewn him that at the time when the account was closed the executor was in advance of the estate $1,400 or $1,500, and he could not have ascertained whether or not the executor had advanced still more, after that time, to the estate; and there were no sources of information open to him from which he could have ascertained that the executor was committing a devastavit when he sold the bonds to Neal; much less could he have known that he was aiding the executor to commit one when he purchased the bonds from Neal after the executor had received the money and used it. If Jones is to be charged with the fact that he might have ascertained, calculated to put him on his guard, he should be credited with those of a contrary character, such as the fact that the executor was in advance of the estate and his statement to Neal on that subject, that he was the brother of the testator and a man of large estate, and confided in by him and by the plaintiffs, his voluntary sureties.

15. So much has been said on the assumption that Jones was bound (under the circumstances) to make enquiry, and that this is a case in which he will be held bound to have known that which, with extreme diligence, he might have ascertained; but it is not admitted, but denied, that he was, by the law of Virginia, "bound to make an enquiry," and this principle has been settled by an unbroken chain of decisions from 6th Call, 362, Garnett vs. Macon, to 15th Gratt., 50, Davis vs. Christian, (a period of thirty-five years,) that a purchaser from an executor is not bound to make any enquiry, but has a right to presume that he is

doing his duty. See Hunter vs. Lawrence, 11 Gratt., 111; in the two latest cases the court adopts, totidem verbis, the language of C. J. Marshall in Garnett vs. Macon.

16. No case has been decided in Virginia (it is believed) in which a remote assignee of a bond has been held liable on account of participation in a devastavit by his assignor with an executor or administrator, and certainly no case has been so decided when no combination or collusion was charged against the remote assignee, with the first assignee who bought from the executor, and no deed of trust or mortgage had been recorded according to law, so that it was of itself notice to all the
6 world. It is not pretended that Jones had anything to do with the executor, that he had any knowledge of or participation in the devastavit, but he seems to have been held bound as an "accessory after the fact," because he bought and got possession of the bonds, and did not allow them, after they had been sold, assigned, and paid for, to remain at a dead-lock in the hands of Neal; "cui bono" should they have been left there? If Jones had paid a premium on them in gold, neither the plaintiffs nor the legatees would have been benefitted, and his buying at a discount injured no one; and, to maintain a suit at law or in equity, the plaintiff must show a right, a violation of that right, and some injury consequent upon that violation.

17. After the assignment of the bonds by the executor to Neal they ceased to be ear-marked, while the faces of the bonds showed that they were executed to Edmund Fitzgerald as executor; the endorsements on the backs showed that they were no longer his bonds, as executor or otherwise, but that they had gone upon the market like any other personal property sold by an executor and delivered, and those endorsements were parts of the bonds. See the arguments of M'r Morson and of M'r Patton, on opposite sides, in Hunter vs. Lawrence, and the opinion of the court; this proposition of law is asserted by M'r Morson, admitted by M'r Patton, and acted on by the court in that case. If Jones was bound to inquire into and ascertain the state of the assets of the testator's estate, and the intentions of the executor, so would each assignee of the bonds be, whatever their number; the range of enquiry would be greatly enlarged but the principle would be the same, and that clear and well-settled principle, that a purchaser without notice may get a good title from one who has notice, would be annulled, and a chose in action could never be cleansed of a taint once fixed upon it.

18. This is a case of purchase from an executor and not from a trustee, "and while constructive notice will avoid a trustee's sale, fraud must be established in the case of an executor," 2d Rob. Old Prac., 23, and cases cited; and here no fraud is charged against Jones, much less proved. King vs. Yarborough, 4th Rand., 566; Sale vs. Roy, 2d H. & M., 69. Fraud must be expressly charged and clearly proved.

19. The notice, whether actual or constructive, to bind a purchaser from an executor, must be notice at the time of the purchase from the executor, of his intention to commit a devastavit. Dodson vs. Simpson, 2d Rand., 294; and in this case Jones did not deal with the assets of W'm Fitzgerald at all; by the sale to Neal the bonds had ceased to be assets of his (Fitzgerald's) estate, and an administrator de bonis non could not have recovered them; they had been administered by the executor.

For these and other errors apparent on the face of the record, your petitioners pray for an appeal and supersedeas to the decree.

LANGHORN SCRUGGS,
MANSEL T. SMITH,
Executors of Richard Jones, Dec'd.

7 I am of opinion that it is proper the decree referred to in the foregoing petition should be reviewed by the supreme court of appeals.

PEACHY R. GRATTAN,
Counsel practicing in the Supreme Court of Appeals.

Appeal allowed. Petitioners being personal representatives, no bond is required.

To the clerk of the supreme court of appeals at Richmond.

JOS. CHRISTIAN.

Oct'r 21st, '71.

Pleas before the judge of the circuit court for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 7th day of June, 1871.

Be it remembered that heretofore, to wit, in the clerk's office of said court, on the 1st day of February, 1869, came W'm T. Clark and John W. Holland, by their attorney, and filed their bill against Caddis B. Luck and others; which said bill is in these words:

Bill.

To his honor the judge of the circuit court of Pittsylvania County:

Humbly complaining, shew to your honor your orators, William T. Clark and John W. Holland, of said county, that one William Fitzgerald, j'r, departed this life in said county in the year 1857, having previously duly published his last will and testament, which was admitted to record in Pittsylvania County court, a copy whereof is herewith exhibited as part of this bill, marked "A." (For Exhibit A, see page 10.) Edmund Fitzgerald, the executor therein nominated, duly qualified as such and gave bond, with Sexton W. Smith and Samuel Bradley as his sureties, for the faithful performance of the duties of his office, said sureties demanding further security from said ex'or. Your orators, on the 20th of May, 1860, joined said ex'or in a new bond as his sureties in the penalty of $34,000. Some time in 1862 said ex'or either resigned or was removed from his said office, and Coalman D. Bennett, then sh'ff of said county, had administration of said estate, then unadministered, with said will annexed, committed to him, and he is now the personal representative of the testator. Some time in the year 1859, Martha V. Fitzgerald, widow of the testator, intermarried with Caddis B. Luck, and on the 22d of June, 1860, they instituted suit in this honorable court against said ex'or and Martha W. Fitzgerald, as posthu-
8 mous child of testator by her, for the purpose of recovering from said ex'or the legacy bequeathed said Martha V. by said will. No step was taken in said cause previously to the late war other than to file the bill and the answer of the ex'or, and none was taken during said war, except to issue a capias ad respondendum against said ex'or, under which no security was taken, the pretended bail being then and ever since insolvent. The ex'or, immediately after service of said process, emigrated from Virginia, first to North Carolina and then to Mississippi, where he has resided ever since. At the time of commencing said suit said ex'or resided in the country aforesaid, and during his residence therein was a man of large property and undoubted solvency.

At the May term, 186 , of this honorable court, an account of the administration of said estate was directed, and Com'r Neal reported $2,175.56 as due said pl't. and $6,644.91 as due said Martha W., with interest on each of said sums from the 22d of October, 1862. Your orators were made parties to said suit by an amended bill filed at May term last of this honorable court, by which it is sought to subject them, as sureties for said ex'or, to the payment of the pl't's demand aforesaid; all which will appear from a copy of the record of the proceedings in said suit, herewith exhibited as a part of this bill, marked "B." The account aforesaid was made up without any vouchers being exhibited, being based upon previously settled accounts of said ex'or, which were in many respects erroneous, with the addition of alleged purchase-money of testator's lands, devised to be sold, when no proof of the receipt of the purchase-money was adduced. No party attended to the taking of said account, and no account was ordered or settled between the ex'or and the devisees and legatees. Your orators charge that the proceeds of the sales of said lands were, in fact, never collected by said ex'or, but the bonds executed by the purchasers of said land were sold at a very heavy discount to the persons hereinafter mentioned, at a time when there was no necessity for so doing, the estate being abundantly able to pay all the debts of the testator without any sacrifice of the assets, the ex'or not then being in advance to any considerable amount to said estate; and, if he had been, said estate being able to pay him said amount without sacrifice of the assets, and said ex'or holding no debt against said estate; all which facts were well known to the purchasers of the assets, hereinafter mentioned, and to each of them. Archer B. Womack bought a part of said land, and owned two bonds given in part payment of the purchase-money—the one for $1,000, the other for $2,293.00—both of which were executed to said Edmund Fitzgerald as ex'or of said William Fitzgerald, and which said ex'or, under the circumstances aforesaid, sold to Griffith D. Neal at a discount greatly beyond six per cent., and who afterwards sold the same to Richard Jones at a discount much greater than 6 per cent., who collected said bonds from the said Womack. Said Jones, as well as said Neal, knew the facts aforesaid under which said bonds were purchased. Said Jones knew them to have been executed to
9 said Edmund, ex'or as aforesaid. He knew that said Neal was in the regular business of purchasing paper at as low a rate as he could get it; that he had purchased these bonds at a rate greater than six per cent., and that the circumstances of the testator's estate did not render such sale necessary. If he did not know these facts, he might easily have acquired that information. One Raleigh White, now deceased, purchased another portion of said land; his purchase-money amounted to $3,982 50c. How much of this money has been paid to said executor your orators have no means of knowing, as said ex'or took with him all the receipts belonging to said estate, and gives your orators no aid and but little information on the subject. They charge, however, that he paid $370.25 of said debt in an account he held against the testator, no part of which is credited to the ex'or in said settlement. One of said bonds of White, amounting to $1,000, was, about 1st July, 1859, assigned to Elisha Barksdale, j'r, who bought the same from said ex'or at a discount greater than six per cent. Said bond was executed to said ex'or, and at the time of said purchase said Barksdale knew that said ex'or was not in advance to said estate, or but very little, and that it could very easily pay it without any sacrifice of its assets, and that said ex'or was not a creditor of said estate. Your orators have every reason to think and believe, and they therefore

charge, that said White did not pay the full amount of the residue of the purchase-money due by him for said land, but that *that* he paid, either himself or thro' agents, if he paid at all, a considerable part of said residue with a sum greatly less than the full amount due, he in fact purchasing his bonds at a discount greater than 6 per cent., knowing that there was no necessity for the sacrifice thereof. That the ex'or was but little in advance to the estate, and for such advance it could readily have paid without any sacrifice of its assetts, and that the ex'or was not a creditor of the estate. Said White has died; the ex'ors of his will declining to accept the office, adm'n, with said will annexed, has been granted to John Kennedy, a copy of which will is herewith exhibited as part of this bill, marked "G." Your orators are advised that, by reason of the premises, the said ex'or has committed a devastavit in the disposal of said bonds, and that said Neal, Jones, Barksdale, and White have participated therein, and are each—the estate of said White—responsible to your orators for the amount of the bonds purchased by each as aforesaid, in consequence of the participation which each of them has had in the devastavit aforesaid, they having applied to said Bennett to recover the same, who refuses to do so, having no assets to pay cost, and is willing that your orators should sue therefor. They are advised that they may be substituted to the rights of the devisees and legatees under the will of the testator, to charge the parties aforesaid for the assetts so as aforesaid unlawfully appropriated to their use, and that because your orators fear they may be subjected to a charge of said devisees and legatees, they may call the parties aforesaid to account for said assetts, as a necessary step in the settlement in the administration of said ex'or, and to aid them in the defence of the suit aforesaid of Caddis B. Luck and wife, the more especially as it is necessary to perpetuate the testimony to the transactions and facts herein stated; much of which will be lost or become impaired before the responsibility of your orators can be ascertained, and also because your orators fear from the general derangement of the pecuniary affairs of the whole community, and the uncertainty of every person's present or future responsibility, the parties herein charged may become unable to pay what may be decreed against them; indeed, some of them are daily becoming irresponsible, and some are nearly so now; to which bill they file this as a cross-bill, and pray that both cases may be heard together, and that any decree which may be rendered against your orators, as sureties as aforesaid, in favor of said Luck and wife and said Martha W. Fitzgerald, may be rendered first to be satisfied by said Neal, Jones, Barksdale, and Cannady, as adm'r aforesaid of said White, to the extent of any amount of testator's assetts which they or either of them may have illegally acquired as aforesaid. In tender consideration of the premises and because your orators are without remedy therein except in equity, (continued on page 5,) the said Caddis B. Luck and Martha V., his wife, said Martha W. Fitzgerald, Coleman D. Bennet, late sh'ff of said county, and as such adm'r de bonis non of William Fitzgerald, j'r, dec'd, with his will annexed; Edmund Fitzgerald, late ex'or of said William Fitzgerald, Griffith D. Neal, Richard Jones, Elisha Barksdale, j'r, and John Cannady, adm'r, with the will annexed, of said Raleigh White, dec'd, may be made def'ts to this bill, and compelled to answer each and all of its allegations; especially may said Neal, Jones, and Barksdale*ale* state what they paid for the bonds assigned each of them, as aforesaid; that said Jones may state whether or not he knew that said Neal had procured the bonds on Womack at a greater discount

than 6 per cent., whether he had any reasons to suppose, when he purchased them, that said Neal had procured them in any other way than by purchasing them at said discount; whether said Neal was not, at the time said Neal got an assignment of said bonds, in the regular habit of trading in paper at such discount; whether he knew of any reason why said Neal became owner of said bonds, except by discounting them as aforesaid, or had any reason to suspect it. Whether he knew of any debt which the testator owed said Neal, or said ex'or, at the time of said transfer of said bonds; whether he consulted said Edmund Fitzgerald before he received his assignment, to know on what terms he had transferred said bonds to said Neal; whether said testator was not related to him, and how, and whether or not he did not have a considerable knowledge of the condition of said testator's estate, and if he had any reason to think that it was necessary to sell
11 said bonds to raise money for the estate; if to sell them at a discount beyond 6 per cent.; whether said ex'or ever offered to sell him the said bonds, or any others due his testator; if so, when, at what discount; what bonds did he so offer him; whether, before purchasing said bonds, he inquired of said Neal on what terms he got them; that said Cannady, adm'r as aforesaid, may state whether or not said White, in his life-time, paid the purchase-money of said land, or whether he himself has paid any part of it; how much has been paid, when, to whom, where the evidence of such payment is; if such pay *if such pay*ment has been made, that he be required to produce such evidence; whether any part of said money was paid in claims of said White against said W'm Fitzgerald; if so, what was the amount and character of such claims; whether said White, thro' the agency of others, settled any part of said money by paying less than the amount he owed said Fitzgerald; if so, by whose agency, and what amount of said debt was thus settled, and how much was paid; what amount of indebtment was claimed by said White from said William Fitzgerald at the time of purchasing said land, or at the time when the money due for said land or any part of it was paid. That any sum properly due the estate of said William Fitzgerald, dec'd, from either of the above parties may be decreed to go in payment of any sum of money which it may appear that said Edmund Fitzgerald, as ex'or of said William Fitzgerald, may owe, in case an exoneration of your orators, his sureties, and the premises considered. That such other and further relief may be granted your orators as equity and their case require.

May it please your honor to grant, &c.

JAMES M. WHITTLE,
For Compl'ts.

Exhibit "A," referred to in plaintiff's bill, is in these words:

EXHIBIT "A."— *W'm Fitzgerald's will.*

In the name of God, amen. I, William Fitzgerald, jun'r, being of sound and disposing mind, do make this, to be my last will and testament as follows, to wit: I desire that my body may be buried at my brother Edmund Fitzgerald's burying-ground, and I direct that all my just debts be paid out of my estate as soon after my decease as may be convenient. I direct that my executor, hereinafter named, to sell my land and all other property that I possess at the time of my decease, except my slaves, and that after the payment of my just debts and the payment of the sum of twenty dollars to the Rev. C. C. Chaplin, I di-

rect that my executor pay over the balance arising from the sale of the above-mentioned property to my beloved wife. I give and bequeath to my beloved wife all my slaves for her own absolute use and bene-
12 fit, provided she does not have a child, the issue of our marriage, or marry again; in either case, I direct that my estate be divided, my wife taking that part of my estate derived by my marriage with her, and that the child have that portion that came by me. If my wife should have a child by me, and it should die, I wish my wife *have* to have the whole estate during her natural life, provided she does not marry; in which cace I give and bequeath that portion of the estate that came by me to my brother Edmund. That portion of my estate that came by my wife I give and bequeath to her forever. I do hereby nominate and appoint my brother, Edmund Fitzgerald, j'r, to be executor of my last will and testament.

In witness whereof I, the said testator, William Fitzgerald, j'r, have set my hand and seal this 13th day of September, in the year 1857.

WILLIAM FITZGERALD, J'R. [SEAL.]

Signed, sealed, published and declared by the testator, William Fitzgerald, j'r, as and for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

R. V. BARKSDALE.
J. C. ANDERSON.
W'M WIMBISH.

Whereas I, William Fitzgerald, j'r, have made and duly executed my last will and testament, in writing, bearing date the 13th day of September, in the year 1857, now I do hereby declare this present writing to be a codicil to my said will, and direct the same to be annexed thereto, and taken as a part:

And I do hereby give and bequeath (at my wife's death) to my brother, Edmund Fitzgerald, j'r, that portion of my estate that came by me, provided she does not have a child by me, and it should live.

In witness whereof I hereunto set my hand and seal, this 13th day of September, 1857.

WILLIAM FITZGERALD, J'R. [SEAL.]

Signed, sealed, published, and declared by said William Fitzgerald, j'r, as and for a codicil to his last will and testament, in presence of

R. V. BARKSDALE.
J. C. ANDERSON.
W'M WIMBISH.

At a county court held for the county of Pittsylvania on the 21st day of September, 1857, the last will and testament of William Fitzgerald, j'r, was proved by W'm Wimbish, a subscribing witness, to be the act and deed of the testator.

13 And at another day, to wit, at a county court held for said county, on the 19th day of October, 1857, the last will and testament of William Fitzgerald, j'r, dec'd, together with his codicil thereto annexed, were proved by Randolph V. Barksdale and J. C. Anderson, two of the subscribing witnesses thereto, to be the act and deed of the testator, and were ordered to be recorded. And on the motion of Edmund Fitzgerald, j'r, the executor in the said will named, who made

oath, and with Sexton W. Smith and Samuel Bradley as his sureties, who made oath to their sufficiency, entered into and acknowledged a bond in the penalty of thirty-four thousand dollars, conditioned according to law, certificate is granted him for obtaining probate of said will and codicil in due form.

Teste:

L. SCRUGGS, *Clk.*

A copy. Teste:

L. SCRUGGS, *Clk.*

May 17th, 1870.

EXHIBIT B.

Exhibit "B," referred to in plaintiff's bill, is in these words:

Record in suit of Luke vs. Fitzgerald.

Pleas before the judge of the circuit court for the county of Pittsylvania, at the court-house thereof, on Monday, the 7th day of November, 1870.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of said court, on Monday, the 3d day of September, 1860, came Caddis B. Luck and Martha W., his wife, formerly Martha W. Fitzgerald, and filed their bill in these words:

Bill.

To his honor George H. Gilmer, judge of the circuit court of Pittsylvania County, in chancery sitting: Humbly complaining, respectfully showeth unto your honor your orator and oratrix, Caddis B. Luck and Martha V., his wife, formerly Martha V. Fitzgerald, that in the year 1857 a certain William Fitzgerald, junior, the former husband of your oratrix, departed this life in this county, after first duly making and publishing his last will and testament, which has been duly admitted to probate in the county court of this county; all of which will more fully and at large appear by reference to a transcript of said will herewith filed, marked (A,) and prayed to be deemed and taken as a part of this bill. That among other provisions in said will the testator devised and bequeathed to your oratrix, in the event of the birth of a child of the marriage or the subsequent marriage of your oratrix after
14 his death, all the estate that came by your oratrix, or, in other words, all the property advanced to her by her father, Sexton W. Smith. Your orator and oratrix further represent unto your honor that after the death of the said William Fitzgerald, j'r, your oratrix was delivered of a child, and that some few months since she was married to your orator. They further represent unto your honor that a certain Edmond Fitzgerald, who was nominated in said will, qualified as executor under the same, and took upon himself the administration of said estate; which will likewise more fully and at large appear by a transcript of the records of the county court of this county, attached to said copy of the will, marked (A,) above referred to, and which is likewise prayed to be deemed and taken as a part of this bill. Your orator and oratrix further represent unto your honor that a large amount of real and personal estate, which went into the possession of her first husband at and during the continuance of said marriage, came to the hands of the said executor, and was administered by him under the provisions

of said will. They further represent unto your honor that all or most of said property was sold by said executor long since, and that he has not returned to your oratrix any amount or statement of her interest under said will, and that both your orator and oratrix are wholly ignorant as to the amount or value of the same: Now, to the end that justice may be done your orator and oratrix, and whereas they are wholly without remedy in a court of law, and relievable only in equity, where matters of this kind are properly cognizable, they pray your honor that the aforesaid Edmond Fitzgerald, executor of William Fitzgerald, deceased, and the aforesaid Fitzgerald, the child of your oratrix and her former husband, William Fitzgerald, j'r, deceased, may be made parties defendants to this bill, and compelled to answer the same on oath. May it please your honor to direct an account of the real and personal estate in the possession of the former husband of your oratrix at the time of his death, derived by his marriage with her. Also, an account of all the transactions of Edmond Fitzgerald, the executor, as aforesaid. And upon the coming in of said report, may it please the court to decree to your orator and oratrix any sums money or property in the hands of said executor to which your oratrix is entitled under the will of the aforesaid William Fitzgerald, and such other and further general relief in the premises grant as equity may accord and the nature of your orator and oratrix' case may require. Grant process, &c.; and as in duty bound they will ever pray, &c.

R. W. LYLES,
For the Complainant.

EXHIBIT A.

Exhibit A, referred to in the plaintiff's bill, is in these words:

In the name of God, amen. I, William Fitzgerald, jun'r, being of sound and disposing mind, do make this to be my last will and testament, as follows, to wit: I desire that my body may be buried at my brother Edmonds Fitzgerald burying-ground, and I direct that all my just debts be paid out of my estate as soon after my decease as may be convenient. I direct that my executor hereinafter named to sell my land and all other property that I possess at the time of my decease, except my slaves, and that after the payment of my just debts, and the payment of the sum of twenty dollars to the Rev. C. C. Chaplin, I direct that my executor pay over the balance arising from the sale of the above-mentioned property to my beloved wife. I give and bequeath to my beloved wife all of my slaves for her own absolute use and benefit, provided she does not have a child, the issue of our marriage, or marry again; in either case I direct that my estate be divided, my wife taking that part of my estate derived by my marriage with her, and that the child have that portion that came by me. If my wife should have a child by me and it should die, I wish my wife *have* to have the whole estate during her natural life, provided she does not marry; in which case I give and bequeath that portion of the estate that came by me to my brother Edmond. That portion of my estate that came by my wife I give and bequeath to her forever. I do hereby nominate and appoint my brother Edmond Fitzgerald, j'r, to be executor of this my last will and testament.

In witness whereof I, the said testator, William Fitzgerald, j'r, have set my hand and seal this 13th day of September, in the year 1857.

WILLIAM FITZGERALD, J'R, [SEAL.]

Signed, sealed, published, and declared by the testator, William Fitzgerald, j'r, as and for his last will and testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

R. V. BARKSDALE.
J. C. ANDERSON.
W'M WIMBISH.

Whereas I, William Fitzgerald, j'r, have made and duly executed my last will and testament in writing, bearing date the 13th day of September, in the year 1857, now I do hereby declare this present writing to be a codicil to my said will, and direct the same to be annexed thereto and taken as a part:

And I do hereby give and bequeath, at my wife's death, to my brother, Edmond Fitzgerald, j'r, that portion of my estate that came by me, provided she does not have a child by me and it should live.

In witness whereof I hereunto set my had and seal this 13th day of Sep tember, 1857.

WILLIAM FITZGERALD, J'R. [SEAL.]

16 Signed, sealed, published, and declared by the said William Fitzgerald, j'r, as and for a codicil to his last will and testament, in presence of

R. V. BARKSDALE.
J. C. ANDERSON.
W'M WIMBISH.

At a county court held for the county of Pittsylvania, on the 21st day of September, 1857, the last will and testament of William Fitzgerald, j'r, was proved by W'm Wimbish, a subscribing witness, to be the act and deed of the testator.

And at another day, to wit, at a county court held for said county, on the 19th day of October, 1857:

The last will and testament of William Fitzgerald, j'r, dec'd, together with his codicil thereto annexed, were proved by Randolph V. Barksdale and J. C. Anderson, two of the subscribing witnesses thereto, to be the act and deed of the testator, and were ordered to be recorded. And on the motion of Edmund Fitzgerald, j'r, the executor in the said will named, who made oath, and with Sexton W. Smith and Samuel Bradley as his sureties, who made oath to their sufficiency, entered into and acknowledged a bond in the penalty of thirty-four thousand , conditioned according to law, certificate is granted him for obtaining probate of said will and codicil in due form.

Teste:

L. SCRUGGS, *Clk.*

A copy. Teste:

L. SCRUGGS, *Clk.*

November 5th, 1858.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 1st day of November, 1860:

Order of Nov'r 1st, 1860.

On the motion of the defendant, Edmund Fitzgerald, executor of William Fitzgerald, dec'd, by counsel, and by leave of the court, he filed his answer; to which the plaintiff replied generally.

The answer of Edmund Fitzgerald, executor of W'm Fitzgerald, j'r, dec'd, is in these words:

Answer of Edmund Fitzgerald.

The answer of Edmund Fitzgerald, executor of William Fitzgerald, deceased, to a bill of complaint exhibited against him and another in the circuit court for the county of Pittsylvania, by C. B. Luck and Martha V. Luck.

17 This respondent, saving and reserving to himself all benefit of exception to said bill, for answer to the same, says that he admits that he qualified as the executor of William Fitzgerald, dec'd, and that his widow has since married the plaintiff C. B. Luck. He also admits that, soon after the death of said Martha's first husband, she gave birth to a child by s'd W'm Fitzgerald. This respondent denies that he owes the said plaintiffs anything. He filed his bill in the circuit court for the county of Pittsylvania for a proper construction of the will of his testator, and in said suit the said Martha V., while a widow, and the child of said Martha V., by guardian ad litem, were made parties, and a decree was rendered, settling the construction of said will, which has guided this respondent in executing the will of his testator. This respondent has promptly settled his account within, in the time required by law, of his administration of his testator's estate under his will, which has been recorded in the clerk's office of the county court of Pittsylvania. By the account settled the 21 of March, 1859, the estate of William Fitzgerald was indebted to respondent $765.41. He, this respondent has settled his account since, and find' some $357.53, so that on the proper settlement of the executorial acc't, exclusive of payments hereinafter referred to on statement A, the estate of his testator would be indebted to him some $1,122.94, with some back interest. The vouchers for his last payments were furnished Commissioner Clark, and he settled the account of this respondent, bringing down the acc't to 21 March, 1860. Said Clark has sent this respondent a copy of this last settlement, and this respondent supposes that said commissioner has returned it to the clerk's office. A very obvious mistake apparent on the face of said last-mentioned account is made, by which the $765.41, balance due this respondent on the first settlement, is charged to him instead of being credited to him, on the 2d settlement; when this mistake is corrected, the bal. due this respondent will be about $1,122.94, as aforesaid.

This respondent also answers that, in addition to said ballance, he has paid for said Martha V., while she was a widow, a large amount, as per statement A. The money for the land has not yet been collected, or any part thereof. This respondent has repeatedly before the institution of this suit proposed to exhibit to said C. B. Luck a statement of his transactions as executor as afores'd, and as agent for M'r's Luck, but said Luck has invariably declined, and this respondent has repeatedly asked for refunding bonds of the plaintiffs, and they have declined up to this time to give them, except such items in the settled acc'ts of this respondent, as ex'or aforesaid, as are erroneous on their face. This respondent is advised that no corrections can be made of the acc'ts set-

tled before Comm'r Clark unless errors are pointed out and the items surcharged and falsified.

This respondent exhibits with this answer, papers, statement A, the decree for the construction of the will, as aforesaid, of his testa-
18 tor's, marked B, and his acc'ts settled before Comm'r Clark, marked C and D. And, having fully answered, prays to be hence dismissed, &c.

VIRGINIA, COUNTY OF PITTSYLVANIA, *to wit:*

This day Edmund Fitzgerald personally appeared before me, a notary public for the county afores'd, and made oath that the matters and things stated in foregoing answer are true to the best of his knowledge and belief.

Given under my hand this 22d day of November, 1860.

JNO. T. WATSON, *N. P.*

EXHIBIT A.

Exhibit A, referred to in answer of Edmund Fitzgerald, ex'or of W'm Fitzgerald, is in these words:

DR. *The estate of W'm Fitzgerald, in account with*

1858.		Prin.	Int.
Octo. 19.	To cash paid W'm Fitzgerald, s'r, per voucher	$2 57	
Nov. 20.	To ditto W'm Wimbish, in p't acc't, per v.	63 45	
1859.			
March 21.	To ditto in full of one acc't, per voucher.	42 65	
	To int. on disbursement to 21 March, 1860.		1 47
	To bal. due 21 March, 1860	656 74	45 35
		$765 41	$45 82
June 18.	To A. S. Buford, per v	5 00	
20.	To Samuel Fitzgerald, per v	7 27	
July 12.	To Geo. N. Read in p't fees, v	50 00	
	To ditto W. H. Tunstall, clerk fees for 1857, per tickets	6 15	
	To ditto for 1858	8 70	
	To Isaac Medley, j'r, clerk of Halifax, for fees 1858, for R. S. Barksdale	1 34	
	To ditto for self 1859, per v	26	
	To ditto W. H. Tunstall, for fees for self, &c., v	2 08	
20	To T. White, clerk of Pitts'a circuit court, fees, v., 1858	5 91	
	To ditto, ditto, 1858, v	5 41	
	To ditto for ditto, 1858, v	4 77	
	To L. Scruggs, clerk tickets for 1858, v	2 80	
	To ditto for 1859, v	20	
	To ditto fee sh'ff of Pitts'a, v., 1857	8 00	
	To ditto 1858 $.50, ditto, 1858, 1.00, v	1 50	
	To ditto 1858, v	1 00	
	To ditto 1858, v	60	
	To ditto 1859, v	3 00	
	To ditto tavern bills at Simmon's Hotel, whilst attending the business of est. 1858	22 25	
Octo. 13.	To ditto sh'ff fi. fa. in favor of R. L. Barksdale, v	17 10	
15.	To ditto balance fees due G. W. Read, per v	62 18	
Nov. 21.	To ditto acc't to W'm Wimbish, for 1857 and 1858, p. v	33 34	
	Carried over	248 86	

19 *Edmond Fitzgerald, jr, the executor.* C'R.

1859.			
March 21.	By balance due per acc't settled this day by Com'r Clark, and return to clerk's office	$765 41	
	By int. on same to 21 March, 1860		$45 82
		$765 41	45 82
	By bal. due estate	$656 75	$44 35
	Carried over.		

20 Account current.

		Prin.	Int.
1860.			
	To amount bro. over.....	$248 86	
March 2.	To cash paid taxes for 1857, 1858, and 1859, and tickets, p. vouchers.....	119 44	
21.	To Comm'r Clark, settling this acc't and copy.....	3 00	
	To int. on disbursements.....		6 07
	To bal. due estate 285.44.....	285 44	38 28
		$656 74	44 35

21 Continued.

	Prin.	Int.
By amount brought over.....	$656 74	$44 35
	$656 74	44 35
1860. March 21. By bal. due estate, the 21 March, 1860..	$285 44	38 28

22 COMMISSIONER'S OFFICE,
Pittsylvania C. H., June 4, 1860.

I have settled one ac't current of estate of W'm Fitzgerald, j'r, with E'd Fitzgerald, j'r, the executor, up to 21st March, 1860, and find that the executor is indebted to the estate, on 21st March, 1870; principal, the sum of $285 44 cents, and $38 28 cents interest. The account will commence next year, on 21st March. I have returned two ac'ts, one of Willis Plunket for $5.10 and one of W. W. Farmer for $1.00. These ac'ts being paid 4th April, 1860, will go in the next ac't for 1860, when they must be returned with the receipts that you may take in hereafter.

DAVID H. CLARK,
Commissioner.

EXHIBIT C.

Exhibit C, referred to in answer of Edmund Fitzgerald, ex'or of W'm Fitzgerald, is in these words:

Dr. The estate of W'm Fitzgerald, j'r, dec'd, in ac't.

Supplemental report.

To the county court of Pittsylvania County:

Your commissioner reports to the court of said county that on the 21st of March, 1859, your com'r stated and settled the account current of the estate of William Fitzgerald, j'r, dec'd, with Edmund Fitzgerald, j'r, the executor, and ascertained a balance due of $765.41 principal, and $45 82 cents interest, which in fact was due the executor, and in making another account on 21st March, 1860, he inadvert'ly carried the credit to the estate. Your com'r has, on this 8th October, 1860, *has* made a supplemental report, in which he has corrected this error, and the correct account stands thus:

To balance due executor on 21st March, 1859	$765 41
Interest on same to 21 March, 1860	45 82
To amount of disbursements made by executor from 21st March, 1859, to 21st March, 1860, (see ac't returned on 17' July, 1860, where said disbursements are enumerated)	371 30
Int. on said disbursements to 21st March, 1860	6 07
1860, March 21. Due executor this day	$1,188 60

Given under my hand as com'r of said court, this 8th October, 1860.

DAVID H. CLARK, *Com'r.*

23 PITTSYLVANIA COUNTY, *sct:*

This day David H. Clark made oath before me, a justice of the peace for said county, that he believes that the within statement is correct.

Given under my hand, this 8th October, 1860.

THO'S R. McDEERMAN, *J. P.*

EXHIBIT D.

Exhibit D, referred to in the answer of Edmund Fitzgerald, ex'or of W'm Fitzgerald, is in these words:

24

D'R. *Estate of William Fitzgerald, j'r, dec'd,*

1857.		
To cash paid by Ed. Fitzgerald for estate before he qualified as executor, viz: to George D. Moore for hack, 24 Sept., 1857, per voucher, to carry coffin		$7 00
Paid Johnson & Clark for coffin for dec'd, per v		30 00
November 28. To James M. Williams, writing deed		2 00
Dec'r 29. To S. M. Tatum, for shroud, v		2 75
1859.		
Jan'y 1. To J. W. Anderson, ac't to 1st Dec'r, 1857, per voucher		91 61
Ditto, Ja's C. Luck in part bond, p. v		147 53
18. Ditto, D. S. Graves, surveying, v		10 00
Feb. 16. Ditto, T. D. Neal, auctioneering, v		15 00
May 16. Ditto, Yeatts & Womack, shop, v		50
Ditto, Cha's E. Davis, witness, v		1 50
Ditto, Geo. Whirley, ditto, v		1 00
19. Ditto, D'r Rawley White, for hires, &c., p. v		370 25
June 24. Ditto, Ro. Early, on ac't land, v		1,750 00
Aug. 3. Ditto, att'y's fee to Coobs, v		10 00
16. Ditto, G. D. Neal, for taking depositions, v		5 00
17. Ditto, E. Barksdale, j'r, ac't, v		15 64
Ditto, George W. Read, att'y's fee, ag't R. White		25 00
Ditto, E'd Register, for sub. to Register from 10th Feb'y, 1857, to 17th Sept., 1857, v		1 45
Ditto, Richmond Whig for advertising property, v		8 50
Ditto, ditto, advertising land for sale, v		12 50
Oct. 14. Ditto, D'r R. V. Barksdale, for medical bill, &c		190 68
		$2,687 91

25

in ac't with Edmund Fitzgerald, the executor. C'R.

1857 and 1858.

By amount of the whole amount sales of personal property made on 19th Novem'r, 1857:

Jesse B. Nunnally	$15 77½
Willis A. Plunket	1 25
Peter L. Burch	1 95
Judethun Vaughan	50
W'm Thompson	97 20
Samuel F. Anderson	17 55
R. V. Barksdale and horse, and int	135 00
W'm C. Terry	47 20
John Perry	2 10
W'm F. Walter	1 00
M'r's M. V. Fitzgerald	40 00
Doctor Anderson	51 80
Thomas Petty	5 65
W'm P. Barksdale	2 98½
W'm Smith	153 05
Sterling B. Strange	25 00
W'm Wimbish	24 05
James M. Davis	16 15
J. N. Cole	3 10
Bird L. Davis	1 40
Thomas E. Ingram	25
John R. Jones	35
James M. Farmer	1 37
Jacob C. Anderson	2 00
Alexander Dodson	24 92
George Franklin	50
James Betterton	55
John W. Power	16 13
Joshua Wood	9 15
James M. Woodson	1 25
Jamison Rossel	2 65
Aug. Coleman	1 45
H. P. Ferguson	50
John Hubbard	65
Thomas J. Dunn	20 87½
John L. Glass	40
John Shotwell	2 25
William A. Dunnamar	13 55
John M. Pollard	12½
	$715 98

26

1858.		
	To amount brought forward	$2,687 91
Oct. 19.	To 5 per cent. commissions allowed executor on $2,289.10 receipts	114 45
		$2,802 36

1858.		
Oct. 19.	To balance due ex'or on this day from est	$1,513 26
Dec. 25.	To cash paid W'm Thompson, services as overseer, per v	100 00
	To James M. Whittle, fee, vs. Dr. Rawley White, p. v	20 00
	Fee bill paid Com'r Banks, v	1 50
1859.		
Mar. 21.	To cash paid Jubal Early, arbitration fee, ag't W'm Fitzgerald, sen'r, viz	37 50
21.	To Com'r Clark, examining, regulating papers, making this ac't and copy	10 00
		$682 26

27	By amount brought forward	$715 98
	By Stephen Coleman	1 50
	By Isaac N. Dodson	55 40
	By S. M. Atkinson	40
	By E. D. Waller	96 20
	By Charles W. Walker	45 10
	By James F. Ferguson	36 60
	By J. Shields	1 00
	By James Terry, sen'r	30 00
	By Richard W. White	50 50
	By Claiborne W. Barksdale	167 00
	By James C. Luck	151 00
	By Nat. Bane	39 25
	W'm White, Danville	157 01
	John B. Hardwick	5 70
	W'm W. Farmer	1 15
	J. P. Barksdale	125 00
	John A. Farmer	46 45
	Stephen D. Tucker	501 56
	Abner McDowell	5 50
	H. J. Cole	2 45
	Benjamin Bayn	11 00
	Thomas Anderson	8 00
	J. W. Douglass	1 00
	W'm J. Dunn	14 50
	J. B. Nunnally	95
	W'm Hill	15 25
	S. A. Anderson	9 35
	John T. Davis	1 70
	A. B. Womack	1 00
		$2,289 10
1858.		
Oct. 19.	—By balance due ex'or	573 26
		$2,802 36

28 1859.

To amount brought up	$682 26
Mar. 21—To cash paid James C. Luck, balance bond and int. due him, p. v	83 15
	$765 41

21. To amount due ex'or from estate this day	$765 41
By amount carried over	$682 26

1859.

Mar. 21. By am't due ex'or	$765 41

COMMISSIONER'S OFFICE,
Pittsylvania C. H., March 24, 1859.

To the court of said county: Your commissioner reports to the court of said county that on the 19th day of December, 1858, Edmond Fitzgerald, the ex'or of W'm Fitzgerald, j'r, dec'd, exhibited before your commissioner a statement of all the money which he, the said Edmond Fitzgerald, had received or paid out or become chargeable with since his qualification as executor of the estate of said decedent on the 19th October, 1857, together with the vouchers for such disbursements. That your com'r embraced the said executor in the list of fiduciaries whose accounts were before him for settlement, which list was posted at the front door of the court-house of said county on the first day of January court, 1859, and on the date of this report, ten days having elapsed since the said account was mentioned in said list, made out and completed the foregoing accounts of said Edmond Fitzgerald, administration of the estate of said decedent, and finds that on the 21st March, 1859, the said estate was indebted to the said executor in the sum of $765.41 cents. The account was supported by satisfactory vouchers, and is herewith returned.

Given under my hand as commissioner of said court the day and year first aforesaid.

DAVID H. CLARK.

At a county court held for the county of Pittsylvania, on the 18th day of July, 1859, the foregoing account-current having been returned to the clerk's office one month, and no exceptions being filed to the same, was examined by the court and confirmed.

Teste:

L. SCRUGGS, *Clk.*

A copy. Teste:

L. SCRUGGS, *Clk.*

6th July, 1860.

29 And at another day, to wit, in the clerk's office of the said court, on the 11th November, 1862, the following affidavit and bond were filed in said office:

Affidavit for capias ad resp.

STATE OF VIRGINIA,
Pittsylvania County, to wit:

This day personally appeared before me, John M. McKinsey, a justice of the peace in and for said county, Caddis B. Luck, one of the plaintiffs

in a suit in equity instituted by plaintiff and wife and Martha W. Fitzgerald against one Edmond Fitzgerald, executor of William Fitzgerald, deceased, and others, which said suit is now pending in the circuit court of said county, and made oath that he, the said Caddis B. Luck, and his coplaintiffs have cause of action against the said Edmund Fitzgerald, for which they have instituted said suit, to recover money and other property bequeathed to the wife of this affiant, and their coplaintiff, under the will of the said William Fitzgerald, deceased, against the said Edmond Fitzgerald, executor as aforesaid, and for which they have instituted said suit in equity against the said Edmond Fitzgerald, as executor as aforesaid; and farther made oath that he, the said Caddis B. Luck, hath probable cause for believing, and does believe, that himself and wife and their coplaintiff will and should recover of and from the said Edmund Fitzgerald, executor as aforesaid, at least the sum of ten thousand dollars, to be equally divided between them, and further made oath that he, the said Caddis B. Luck, has probable cause for believing, and that he does believe, that the said Edmund Fitzgerald, defendant as aforesaid, is about to quit this State unless he, the said Edmond Fitzgerald, be forthwith apprehended; and thereupon I, the said justice, do order that the said Edmund Fitzgerald be held to bail in the said suit in equity pending in the said circuit court of the county aforesaid against him and others, as aforesaid, in the sum of $10,000.

Given under my hand seal this the 16th day of November, 1862.

J. W. McKINSEY, *J. P.* [SEAL.]

Bond for capias ad res.

Know all men by these presents that we, Caddis B. Luck, John W. Holland, and William T. Clark, are held and firmly bound unto Edmond Fitzgerald, in the just and full sum of ten thousand dollars; to the payment whereof, well and truly to be made to the said Edmond Fitzgerald, his executors or administrators, we bind ourselves, our heirs, executors, and administrators, firmly, and jointly, and severally, by these presents, sealed with our seals, and dated this the 10th day of November, 1862.

The condition of the above obligation is such that whereas
30 the above-bound Caddis B. Luck is about to sue out of the clerk's office of the circuit court of Pittsylvania County a writ of capias ad respondendum against the said Edmond Fitzgerald, in a suit in equity now pending in the said circuit court between the said Caddis B. Luck and wife, and another, plaintiffs, and the said Edmund Fitzgerald, one of the defendants: Now, therefore, if the above-bound Caddis B. Luck shall pay the said Edmond Fitzgerald all costs and damages which may be awarded against him or sustained by the said Edmund Fitzgerald by reason of the arrest of the said Edmund Fitzgerald under the said writ of capias ad respondendum, then the above obligation to be void; otherwise to remain in full force and virtue.

C. B. LUCK. [SEAL.]
JOHN W. HOLLAND. [SEAL.]
WILL. T. CLARK. [SEAL.]

Signed and acknowledged in my presence.

J. W. McKINSEY, *J. P.*

And a capias ad respondendum was issued in these words, (not on file with papers.)

The following is a copy of the recognizance filed in this cause:

Recognizance.

Know all men by these presents that we, Edmond Fitzgerald and A. L. H. Muse, are held and firmly bound unto the Commonwealth of Virginia in the sum of ten thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 15th day of November, 1862.

The condition of the above obligation is such that, whereas the above-bound Edmund Fitzgerald has been arrested by C. L. Powell, deputy for C. D. Bennett, sheriff of the county of Pittsylvania, by virtue of a capias issued from the circuit court of Pittsylvania County, and to the said sheriff directed, commanding the said sheriff to take the body of the above-bound Edmund Fitzgerald, and him safely keep, so as to have his body before the judge of the said court, at the court-house thereof, on the first day of May term next, to answer *to answer* a bill in chancery exhibited in this court against him and others by Caddis B. Luck and wife: Now, if the said Edmund Fitzgerald shall personally appear in court before the judge of the circut court holden for the county of Pittsylvania, at the court-house thereof, on the first day of May term next of the said court, to answer the bill aforesaid, and
31 shall not depart thence without leave of the said court, then the above recognizance shall be void; otherwise to remain in full force and virtue.

EDMUND FITZGERALD. [SEAL.]
A. L. H. MUSE. [SEAL.]

Taken and acknowledged before me, the day and year first above written, in the county of Pittsylvania, Virginia.

C. L. POWELL, *D. S.*

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 6th day of June, 1866:

Order of 6th June, 1866.

For reasons appearing to the court it is ordered that this cause be continued till the next term.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Monday, the 12th day of November, 1866:

Order of 12th November, 1866.

For reasons appearing to the court, it is ordered that this cause be continued till the next term.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Monday, the 10 day of June, 1867:

Order of 10th June, 1867.

John L. Hurt is appointed guardian ad litem of the infant defendant Martha W. Fitzgerald, to defend her interest in this suit; and thereupon said John L. Hurt, as such guardian, filed his answer to the bill of plaintiff; to which answer the plaintiff, by counsel, replied generally; and the cause, coming on to be heard on the bill of the plaintiff's answers to Edmund Fitzgerald, j'r, and of said guardian ad litem, with general replication thereto and exhibits, was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the defendant, Edmund Fitzgerald, render before one of the commissioners of this court an account of his transactions as executor of William Fitzgerald, dec'd, and that said commissioner shall audit and settle said account; and in taking said account shall make, as the basis of the same, the account heretofore rendered by said Fitzgerald before Commissioner Clark,
32 which shall be regarded as prima facie correct, except for errors apparent on the face of the same, and except such items as have been pointed out and surcharged and falsified by plaintiffs. Said commissioner shall also take an account of the specific personal estate of the testator, William Fitzgerald, dec'd, that came or ought to have come into the hands of his said executor to be administered; and in taking all of said accounts said commissioner shall be guided by the construction made of the will of William Fitzgerald by a decree rendered in this court on the day of , 18 , in the suit of . Said commissioner shall make special statements, in making up said accounts, of any matters he may himself deem pertinent, or he may be required to make by either of the parties, and make report to this court.

The answer of the infant defendant is in these words:

Answer of guardian ad litem.

LUCK
vs.
FITZGERALD, EX'TRIX, &C. } May term, 1867.

The answer of Martha Fitzgerald, by John L. Hurt, her guardian ad litem, to a bill of complaint exhibited against her in the circuit court for the county of Pittsylvania, by Caddis B. Luck, and Martha, his wife, against her and another. This respondent, by her said guardian, says she is under twenty-one years of age, and submits her rights and interest to the protection of this honorable court; and, having fully answered, prays to be hence dismissed, &c.

MARTHA FITZGERALD,
By JNO. L. HURT,
Her Guardian ad litem

The following is a copy of the report of Com'r Neal, made under cree of May term, 1867:

33

34

D'R. *The estate of W'm Fitzgerald, j'r, dec'd, in*

		Principal.	Interest.
1859.			
Mar. 21.	To balance due ex'or from the estate, per acc., settled by Com'r Clark, and confirmed by the court	$765 41	
	To cash paid W'm Wimbish, in part of store acc't, as of the 20th of Dec., 1858.	63 45	
	To cash paid same in full of do	42 65	
June 18.	To cash paid A. S. Buford, attorney's fee	5 00	
20.	To cash paid Samuel Fitzgerald, 2 blacksmith's acc's	7 27	
July 12.	To cash p'd Geo. W. Read, in part of attorney's fee	50 00	
Oct. 13.	To cash paid sheriff, fi. fa. in favor of R. S. Barksdale	17 10	
	To cash paid R. S. Barksdale	1 34	
15.	To cash paid Geo. W. Read, in full his attorney's fee	62 18	
Nov. 21.	To cash p'd W'm Wimbish, another store acc	33 34	
1860.			
Mar. 2.	To cash p'd sheriff, tax acc. for the years 1857, '8, and '9, and sheriff and clerk's tickets, per receipt	119 44	
	To cash p'd sheriff's tickets	6 00	
	To cash p'd L. Scruggs	6 80	
	To cash p'd circuit court clerk's tickets	17 21	
	To cash paid sheriff's ticket for the year 1857	8 00	
	To cash p'd Simmon's hotel bill, on account of estate, per receipt of 22d of June, 1858	22 25	
21.	To cash paid Com'r Clark for settling acc. and copy	3 00	
	Carried forward	$1,230 44	

35

acc. with Ed. Fitzgerald, the ex'or. C'R.

		Principal.	Interest.
1859.			
Mar. 21.	By error in the addition of acc. current settled by Com'r Clark this day, and also in commissions	12 04	
	Carried forward.....	$12 04	

36

		Principal.	Interest.
1860.			
Mar. 21.	To amount brought forward	$1,230 44	
	To int. on $765.41, since March 21st, '59		45 92
	To int. on $63.45 since Dec. 20, '58		4 76
	To int. on $42.65 since March 21, '59		2 55
	To int. on $5.00, since June 18, 1859		22
	To int. on $7.27, since June 20, '59		32
	To int. on $50.00, since July 12, '59		2 06
	To int. on $18.44, since Oct. 13, '59		47
	To int. on $62.18, since Oct. 15, '59		1 56
	To int. on $33.34, since Nov. 21, '59		66
	To int. on $157.45, since March 2, '60		30
	To int. on $22.25, since June 22, '58		2 33
	To int. on $3.00, since March 21, '60		0 00
		$1,230 44	$61 15
1860.			
Mar. 21.	To balance due ex'r, per contra	$1,218 40	$60 43
	To cash paid Samuel F. Anderson, witness' ticket, in suit vs. White, as of the 15th of May, 1858	2 14	
April 4.	To cash p'd Willis A. Plunkett, blacksmith's acc. for 1857	5 10	
Aug. 11.	To cash p'd sheriff of Pittsylvania, amount of fi. fa. v. testator	17 79	
1861.			
Jan. 6.	To cash paid John W. Fitzgerald, am't of acc. and interest	143 20	
9.	To cash paid sheriff of Pittsylvania, taxes for 1860, and sheriff's and clerk's tickets	43 80	
Feb. 18.	To cash p'd James W. Ferrell, for serving notices on Easley	1 00	
	Carried forward	$1,431 43	$60 43

37

1859.			
Mar. 21.	By amount brought forward	$12 04	
	By int. on $12.04 from 21st March, 1859.		72
1860.			
Mar. 21.	Balance due ex'or, per debit	1,218 40	60 43
		$1,230 44	$61 15

38

D'R *The estate of Wm. Fitzgerald, j'r, dec'd, in*

		Principal.	Interest.
1861.			
Feb. 18.	To amount brought forward.....	$1,431 43	$60 43
Mar. 21.	To int. on $1,218.40, since March 21st,'60.		73 10
	To int. on $2.14, since May 15th, '58....		35
	To int. on $5.10, since April 4th, '60.....		28
	To int. on $17 79, since Aug. 11th, '60..		65
	To int. on $143.20, since Jan. 6th, '61....		1 78
	To int. on $43.80, since Jan. 9th, '61		51
		$1,431 43	$137 10
1861.			
Mar. 21.	To balance due the ex'or per contra....	$1,431 43	$137 10
1862.			
Mar. 21.	To int. on the above balance.....		85 88
		$1,431 43	$222 98
1862.			
Mar. 21.	To balance due ex'or per contra.....	$1,431 43	$222 98
Oct. 20.	To int. on the above balance.....		49 85
1862.			
Oct. 20.	To balance due estate per contra.....	$6,844 07	1,973 40
		$8,275 50	$2,246 23

39

acc. with Ed. Fitzgerald, the ex'or. C'R.

		Principal.	Interest.
1861.			
Mar. 21.	By balance due ex'or per debit.....	$1,431 43	$137 10
		$1,431 43	$137 10
1862.			
Mar. 21.	By balance due ex'or per debit.....	$1,431 43	$222 98
		$1,431 43	$222 98
1862.			
Oct. 20.	By amount of Rawley White's purchase of land sold by ex'or under the will of testator on the 19th day of Nov., 1857, with int. on same from Nov. 19th, 1857, to date.....	$3,982 50	$955 80
	By amount of Archer B. Womack's purchase of land sold by ex'or under the will of testator on the 19th day of Nov., 1857, with int. on same from Nov. 19th, 1857, to date.....	4,293 00	1,290 43
		$8,275 50	$2,246 23
1862.			
Oct. 20.	By balance due estate per debit.....	$6,844 07	$1,973 40
	By int. brought into column of principal for distribution.....	1,973 40	
	Carried forward.....	$8,817 47	

40

		Principal.	Interest.
1862.			
Oct. 20.	To balance for distribution per contra...	$10,522 45	
		$10,522 45	
	To Caddis B. Luck and wife for their distributive share of the estate of the testator.....	$3,075 62	
	To Martha William Fitzgerald for her distributive share of the same.....	7,446 83	
		$10,522 45	

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		Principal.	Interest.
1862.			
Oct. 20.	By balance brought forward for distribution	$8,817 47	
	By Caddis B. Luck and Martha M., his wife, formerly Martha Fitzgerald, the widow of the testator, for this sum, being their proportion of $1,704.98, the balance of the debts charged against the estate of the testator, and directed by a decree of the circuit court of Pittsylvania County, rendered at its May term, 1859, in a suit in chancery between Edmund Fitzgerald, pl'ff, and Martha Fitzgerald and others, def'ts, to be charged pro rata on the value of the estate given by the testator to his widow and infant child, Martha W., in proportion to the amount received by each, after applying to the payment of the said debts the property to which the testator died entitled that cannot be traced to advancements made either to himself or wife, and not included in the advancement specified in the report of Com'r Clark, made in pursuance of said decree	903 06	
	By Martha William Fitzgerald for the same	801 92	
		$10,522 45	
1862.			
Oct. 20.	By balance for distribution per debit	$10,522 45	
		$10,522 45	

42

D'R. *Caddis B. Luck and Martha M., his wife, legatees of W'm*

		Principal.	Interest.
1862.			
Oct. 20.	To this sum, being your proportion of $1,704.98, the balance of the debts against the estate of the testator, and directed by a decree of the circuit court of Pittsylvania County, rendered at its Oct. term, 1859, in a suit in chancery between Edmund Fitzgerald, pl't'ff, and Martha Fitzgerald and others, def'ts, to be charged pro rata on the value of the estate given by the testator to his widow and infant child under his will, in proportion to the amount received by each	$903 06	
	To balance due from ex'or	2,172 56	
		$3,075 62	

D'R. *Martha William Fitzgerald, legatee of W'm Fitzgerald, j'r,*

		Principal.	Interest.
1862.			
Oct. 20.	To this sum, being your proportion of $1,704.98, the balance of the debts against the estate of the testator, and directed by a decree of the circuit court of Pittsylvania County, rendered at its Oct. term, 1859, in a suit in chancery between Edmund Fitzgerald, pl't'ff, and Martha Fitzgerald and others, def'ts, to be charged pro rata on the value of the estate given by the testator to his widow and infant child under his will, in proportion to the amount received by each	$801 92	
	To balance due from ex'or	664 91	
		$7,446 83	

43

Fitzgerald, j'r, dec'd, in acc. with Ed. Fitzgerald, the ex'or. C'R.

		Principal.	Interest.
1862.			
Oct. 20.	By this sum, being your distributive share of the estate of the testator under his will	$3,075 62	
		$3,075 62	
1862.			
Oct. 20.	By balance due from the ex'or per debit.	$2,172 56	

dec'd, in acc. with Ed. Fitzgerald, the ex'or. C'R.

		Principal.	Interest.
1862.			
Oct. 20.	By this sum, being your distributive share of the estate of the testator under his will	$7,446 83	
		$7,446 83	
1862.			
Oct. 20.	By balance due from the ex'or per debit.	$6,644 91	

44 COMMISSIONER'S OFFICE, PITTSYLVANIA COURT-HOUSE,
Sept. 10*th*, 1867.

To the circuit court of Pittsylvania County:

Pursuant to a decree of the circuit court of Pittsylvania County, rendered at its May term, 1867, in a suit in chancery pending in said court between Caddis B. Luck and Martha, his wife, pl't'ffs, and Edmund Fitzgerald, ex'or of William Fitzgerald, j'r, dec'd, and Fitzgerald, infant child of W'm Fitzgerald, j'r, dec'd, def'ts, directing one of the commissioners of the said court to audit and settle the account of the said Edmund Fitzgerald, ex'or, as aforesaid, and to take an account of the specific personal estate of the testator, W'm Fitzgerald, dec'd, that came, or ought to have come, into the hands of the said ex'or to be administered, and to make special statements of any matter deemed pertinent by himself or required to be made by either of the parties. The undersigned, one of the com'rs of the said court, in whose hands the said accounts were placed for settlement, reports to the court that he issued notices against the parties aforesaid, that he had fixed upon the 5th day of Sept., 1867, at his office, to audit and settle the said accounts, one of which notices was published for four successive weeks in the Danville Times, a newspaper published in the town of Danville, and the service of the other was duly acknowledged by the counsel for the pl't'ffs and for the def'ts, which notices are herewith filed. None of the parties appearing before your com'r at the time and place appointed for taking the said accounts, he continued the taking of the same from day to day until the date of this report; and the parties still failing to appear, he examined the papers before him, and thereupon made up and completed the foregoing accounts up to the 20th Oct., 1862, the date that the said Edmund Fitzgerald vacated his office as ex'or, and on that day, after correcting the errors apparent upon the face of the accounts settled by Com'r Clark and by Com'r Tredway, finds a balance of $10,522.45 due from the ex'or to the said estate, of which sum $1,973.40 is interest. This balance is made up of assets received by the said ex'or, belonging to the said estate, amounting to the sum of $8,817.47, after the payment of the debts, and of $1,704.98, the amount of debts against the said estate directed by the decree rendered in this cause by the said court to be charged pro rata on the value of the estate given to the testator's widow and his infant child, in proportion to the amount received by each, after applying, towards the payment of the debts against the said estate, the sum of $2,312.30, arising from the sale of the property to which the testator died entitled that could not be identified with or traced to advancements made either to himself or wife, and not included in the advancements specified in the report of Com'r Clark, as will more fully appear by reference to a statement marked "B," (and herewith filed,) made by your com'r, exhibiting the gross receipts that came into the hands of the said
45 ex'or, and the gross disbursements made by him, and of the application of the same, and the distribution of the balance in his hands among the legatees. That your com'r distributed the balance aforesaid, due from the ex'or to the said estate, among the legatees of the said testator under his will, according to the construction of the same by a decree rendered in this cause by the said court the 10th of June, 1859, as follows: To Caddis B. Luck and Martha his wife, formerly Martha Fitzgerald, the widow of the testator, $3,075 62; to Martha William Fitzgerald, the child of the testator, $7,446.83. That he raised accounts between the said ex'or and the said legatees, and on the 20th

of Oct., 1862, finds a balance of $2,172.56 due from the said ex'or to Caddis B. Luck and wife, and a balance of $6,644.91 due from the said ex'or to Martha William Fitzgerald, the child of the said testator, all of which is principal. That in obedience to said decree your com'r made up and completed on account of personal estate of the said testator that came or ought to have come to the hands of the said ex'or to be administered, and finds that the value of the same amounts to the sum of $6,900, as will appear by reference to said account, marked "A," and herewith filed. That it does not appear from the papers before your commissioner what disposition was made by the said ex'or of the said specific personal estate, except as to the negroes belonging to the widow, which were delivered to her by the ex'or, as per copy of receipt marked Z, and herewith filed; and except also as to a negro man named Ned, about whom there was a controversy which was submitted to arbitration, and the said negro was, by the award of the arbitrators, declared to be the property of William Fitzgerald, sen'r, and is not embraced in this account, as will appear by a copy of the award, marked X, and filed with this report. Your com'r further reports to the court that he made up a statement of the specific personal property, and of the money invested in land, at its enhanced value, received by the testator and wife as advancements from their parents, and directed by a decree of the court in this cause made the 10th of June, 1859, to be distributed to the wife of the said testator and his infant child, and finds that the value of the same amounted to the sum of $12,980.00, of which sum $6,875.00 was the widow's share, and $6,105.00 the child's share, which will appear by reference to the said statement marked "A" and herewith filed, page 2d. That it appears from the account of sales of the property belonging to the estate of the testator that the ex'or sold the land belonging to the said estate on the 19th of Nov., 1857, and as there is no evidence before your com'r that the money has not been paid he charged it to the ex'or in the foregoing account, with interest thereon from the date of the sale. The account, together with the notices, papers, and statements, is herewith returned to the court.

Given under my hand, as com'r of the said court, the day and year first aforesaid.

G. D. NEAL, *Com'r.*

46	Time employed by the com'r in examining papers and correcting the errors in the accounts settled by Com'r Clark and Com'r Tredway, and in writing our report 60 hours, 75 c	$45 00
	Issuing three notices, at 20 cts	60
	Charged to pl't'ffs	45 60

G. D. NEAL, *Com'r.*

Exceptions to com'r's report.

Exceptions to Commissioner Neal's report are in these words:

The defendants, Clark and Holland, except to the report of Com'r Neal, dated Sept. 10th, 1867, for the following reasons, viz:

I. Because of the omission to credit the ex'or of W'm Fitzgerald with the sum of one hundred and one dollars and seventy-four cents, p'd by the said ex'or to W'm Wimbish on account of the female plaintiff, as appears from the deposition of said Wimbish.

2. Because the said com'r charged the said er'r with interest on the

purchase-money for the land due from White, from the 19th of Nov., 1857, when said purchase-money did not bear interest as to the am't of $1,000, until the 1st of July, 1859, as per deposition of said Wimbish, and as to the balance of said purchase-money due from White, the same did not bear interest until some time after 19th Nov., 1857, and none of it could have borne interest from that day, because, if any had been then collected the ex'or had a right to hold the same without interest for six months. Vide 3d Mumford, p. 303, and 9 Leigh, 490, and 3 Leigh, 407, and because there is no evidence to justify the com'r in charging int. from that date.

3. Because the am'ts paid by W'm Fitzgerald, ex'or, as per deposition of James Early, viz, $1,307 on the 14th of July, '58, $167 on the 6th of September, '58, and $60 on the 1st of March, 1859, have been omitted in said report.

4. Because, in said report interest is charged on the purchase-money for the land sold to A. B. Womack, from the 19th of Nov., 1857, when interest should not have been charged until 18th of Nov., 1858, as per deposition of A. B. Womack, and even if received on 19th of Nov., 1857, the ex'or had a right to hold the same without interest for six months. Vide 3 Mumford, page 303, 9 Leigh, 490, and 3 Leigh, 407.

5. Because the com'r swells the debt of the ex'or unjustly by adding the debt of $1,704, which should be paid out of the assets of the estate, to the real assets, viz, $8,817.47, making the debt due the estate by the ex'or $10,522.45, instead of $8,817.47, as per Com'r Neal's
47 report, dated 10th of September, 1867, pages one and two. For these and other errors apparent on the said account, said defendants pray that the same may be recommitted.

JAMES M. WHITTLE,
For Def'ts.

JUNE 30TH, 1870.

EXHIBIT B.

Exhibit "B," referred to in the foregoing report, is in these words:

A statement exhibiting the gross receipts and the gross disbursements of Edmund Fitzgerald, ex'or of W'm Fitzgerald, j'r, dec'd, from the date of his qualification up to the 20th day of Oct., 1862, and also its application and distribution.

This sum received by the ex'or	$12,834 75

Of the above sum received by the ex'or, $2,312.30 were receipts arising from the sale of property not identified with or traced to advancements made to the testator and his wife, and directed by the decree of the court in this cause to be applied to the payments of the debts against the said estate, amounting to the sum of $4,017.28, leaving a balance of $1,704.98, as ordered by said decree to be charged pro rata on the value of the estate given to the testator's widow and to his infant child, Martha W'm, in proportion to the amount received by each.

To this sum, being the amount of disbursements made by the ex'or of the testator	$4,017 28

C'R.

By this sum received for property not identified with or traced to advancements, to be applied to the payment of the debts, as per statement above	2,312 30	
By this sum charged as the widow's portion of $1,704.98, as per statement above	903 06	
By this sum, being the child's portion of same, as above	801 92	
		$4,017 28
Balance for distribution		$8,817 47
Caddis B. Luck and wife for this sum, being their proportion of $1,704.98, charged pro rata on the value of the estate given to the testator's widow, as above	903 06	
Martha William Fitzgerald for the same, do., do	801 92	
		$1,704 98
		$10,522 45
48 By total amount brought forward for distribution		10,522 45
To Caddis B. Luck and wife, their distributive share of the above balance	3,075 62	
To Martha William Fitzgerald for the same	7,446 82	
		$10,522 45

RECAPITULATION.

Amount of receipts		$12,834 75
Amount of disbursements		4,017 28
		$8,817 47
C. B. Luck and wife for this sum		903 06
Martha W. Fitzgerald do		801 92
		$10,522 45
C. B. Luck and wife's share	$3,075 62	
Deduct this sum for their proportion of debts due from estate	903 06	
	$2,172 56	
Martha William Fitzgerald's share	$7,446 83	
		$10,522 45
Deduct this sum for her proportion of debts due from estate	801 92	
Balance due Martha William Fitzgerald	$6,644 91	

Exhibit "A" referred to in report of commissioner.

Exhibit "A," referred to in the foregoing report, is in these words:

An account of the specific personal estate of William Fitzgerald, j'r, dec'd, that came or ought to have come into the hands of his ex'or, Ed.

Fitzgerald, taken by G. D. Neal, one of the commissioners in chancery of the circuit court of Pittsylvania County, in pursuance of a decree of the said court rendered at its May , 1867, in a suit in chancery pending in said court between Caddis B. Luck and wife, pl'ffs, and Ed. Fitzgerald, ex'or, &c., def'ts.

1 negro man, Gardner	$1,400 00		
1 negro woman, Paulina, and 6 children	3,100 00		
Household and kitchen furniture, and cattle, value	100 00		
1 horse	75 00		
			$4,675 00
49 1 negro woman, Minerva, and 2 children	$2,000 00		
1 horse	100 00		
Some cattle and household furniture	125 00		
			$2,225 00
			$6,900 00

An account of the specific personal property of the money invested in land belonging to the estate of W'm Eitzgerald, j'r, dec'd, received as advancements by the testator and his wife, Martha, and directed by a decree of the circuit court of Pittsylvania County, rendered at its May term, 1867, in a suit in chancery pending in said court between Caddis B. Luck and Martha, his wife, pl'ffs, Ed. Fitzgerald and others, def'ts, to be distributed under a decree of the court rendered in this cause the 10th of June, 1859, to Martha, the widow of the testator, now the wife of Caddis B. Luck, and to his infant child, according to the construction of the will made by the said decree:

Widow's portion.

1 negro man, Gardner	$1,400 00	
1 negro woman, Paulina, and 6 children	3,100 00	
Household and kitchen furniture, and cattle, value	100 00	
1 horse	75 00	
This sum being the amount vested in land, with its enhanced value	2,200 00	
	$6,875 00	$6,875 00

Child's portion.

1 negro woman, Minerva, and 2 children	$2,000 00	
1 horse, value	100 00	
Some cattle and household furniture, value	125 00	
This sum being the amount vested in land, with its enhanced value	3,880 00	
		$6,105 00
		$12,980 00

Exhibit "Z" and "X," not filed.

Exhibit "Z" and "X," referred to in the foregoing report, are not filed with the papers.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Saturday, the 2d day of November, 1867:

50 *Order of 2d Nov'r*, 1867.

On motion of the plaintiffs, by their attorney, they have leave to file an amended bill in this cause, and the same is remanded to rules for further proceedings to be had therein.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 5th day of June, 1868:

Order of 4th June, 1868.

On motion of the plaintiffs, by their counsel, they have leave to file an amended bill in this cause; which is accordingly done, and the cause is to retain its place on the docket.

The amended bill of the plaintiffs is in these words:

Amended bill.

To the hon. G. A. Wingfield, judge of the circuit court of Pittsylvania:

The amended bill of Cadiz B. Luck and Martha V., his wife, respectfully represents that they heretofore filed their original bill in this honorable court, by which it was set forth that a certain William Fitzgerald, junior, departed this life in the year 1857, in the county of Pittsylvania, possessed of a considerable estate, real and personal, having first made and published his last will and testament, by which Edmund Fitzgerald was appointed executor, and said will was duly admitted to record before the county court of Pittsylvania, and the said Edmund Fitzgerald qualified as executor and proceeded to administer said estate. That your oratrix was left a widow of said testator, and has since intermarried with her co-plaintiff, Cadiz B. Luck, and the said will provided that in the event your oratrix should marry or give birth to a child by her marriage with said testator, she should be entitled to all the estate which was derived from S. W. Smith, the father of your oratrix. That a child was born, issue of her said first marriage, and the said executor took possession *a* said estate, real and personal, and sold the same, amounting to a considerable sum, and had failed to render any proper account of his transactions or settle with your oratrix. Your orators and oratrix prayed in said bill for a settlement of the accounts of said executor and a decree for the portion of said estate to which she was entitled, and for general relief. In addition to the matters and things set forth in said original bill, your orators and oratrices, still relying upon the same, beg leave to state, in this amended bill, that the said Edmund
51 Fitzgerald qualified as executor of said W'm Fitzgerald, and entered into bond in the penalty of $, with William T. Clark and John W. Holland, his sureties, conditioned as required by law, as may be seen by an inspection of a copy of said bond herewith filed and marked O, and prayed to be taken as a part of this bill. That as such sureties, the said Clark and Holland, are liable for the acts of said executor, and for a large ballance due to your orator and oratrix, as well as to the Fitzgerald, posthumous child of said testator.

In consideration whereof they pray that the said Edmund Fitzgerald, executor of W'm Fitzgerald, dec'd, William T. Clark, John W. Holland, Martha Fitzgerald, who is under twenty-one years of age, may be made parties defendant to this amended bill, and compelled to answer the allegations thereof fully upon oath. May the said Edmund Fitzgerald, William T. Clark, and John W. Holland be decreed to pay to your orator and oratrix such amounts as may be ascertained to be due to them from said executor, and such other and general relief in the premises as equity may accord and their case require, &c.

LYLES & TREDWAYS,
For Compl'ts.

EXHIBIT O.

Exhibit O, referred to in the plaintiffs' amended bill, is in these words:

Know all men by these presents that we, Edmund Fitzgerald, John W. Holland, and William T. Clark are held and firmly bound unto the Commonwealth of Virginia in the sum of thirty-four thousand dollars; to the payment of which, well and truly to be made, we bind ourselves and each of ous, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 20, day of May, 1861. The condition of the above obligation is such that, whereas the county court of Pittsylvania County have required the above Edmund Fitzgerald, as the executor of William Fitzgerald, j'r, dec'd, to execute a new bond as executor as aforesaid, in the penalty aforesaid: Now if the said Edmund Fitzgerald shall faithfully discharge the duties of said office or trust, then the above obligation to be void; else to remain in full force and virtue.

EDMUND FITZGERALD. [SEAL.]
JOHN W. HOLLAND. [SEAL.]
WILL. T. CLARK. [SEAL.]

Signed, sealed, and acknowledged in open court.

At a county court held for the county of Pittsylvania on the 20th day of May, 1861:

52 The foregoing bond was entered into and acknowledged by the obligors to be their act.

Teste:

L. SCRUGGS, *Clk.*

A copy. Teste:

L. SCRUGGS, *Clk.*

And at another day, to wit, at a circuit court held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 28th day of October, 1868.

Order of 28 *Octo.*, 1868.

On motion of the defendants, William T. Clark and John W. Holland, and by leave of the court, filed their joint answer, to which the plaintiff replied generally.

The answer of W'm T. Clark and Jno. W. Holland, filed 28th October, 1868, is in these words:

Joint answer of W'm T. Clark and John W. Holland.

The answer of William T. Clark and John *M.* Holland to a bill of complaint exhibited against themselves and others in the circuit court of Pittsylvania County by Caddis B. Luck and Martha V., his wife.

These respondents, answering, say that they admit the death of William Fitzgerald, the publication and probate of his will and codicil, and the qualification of Edmund Fitzgerald as his executor, as stated in the bill. These respondents did not become the sureties of said Edmund on his qualification as said ex'or, but one Sexton W. Smith and Samuel Bradley became such, and executed a bond jointly with said Edmund. Some time thereafter said Edmund was required by the county court of said county to execute a new bond as ex'or as aforesaid, when these respondents joined him in the bond mentioned in plaintiff's amended bill, but they know not that said proceedings are regular, and do not admit that they are. At the time of their joining in said bond said ex'or was deemed by them and was generally considered able to pay his debts and liabilities, and he satisfied these respondents that he owed nothing, or very little, to the estate of his testator. Indeed, his accounts, as personal representative of testator, settled by the proper officer, shewed this. This suit was then pending, and the 10th November, 1862, said Edmund being about to emigrate from the State of Virginia, these respondents, anxious to get an indemnity against all loss which they might sustain as such sureties, and p'l't Luck, being anxious to get additional security for any amount coming to himself and wife from testator's estate, sued
53 out a writ of capias ad respondendum against said Edmund, on which bail was required, and these respondents, to get indemnity to themselves, joined said Caddis B. Luck in the bond he was required to give to entitle him to said writ, when one A. L. H. Muse was taken as surety in the recognizance executed by said Edmund, without objection by said Caddis, tho' at the time said Muse was insolvent, and has so continued to be ever since. About the time of sueing out said writ, said Edmond resigned or was removed from his office by the county court aforesaid, and administration de bonis non with the will annexed of the testator's estate was committed to Coalman D. Bennett, then sh'ff of said county, who now holds said office, and who these respondents are advised should be a party to this bill, and alone is entitled to the assetts of the testator. About the time of suing out the capias aforesaid, said Edmund emigrated from this State, and has ever since resided thereout, and has become insolvent in consequence of the war. When said Edmund emigrated he left no papers or vouchers, connected with his testator's estate, with these respondents, or either of them. He gave them no information respecting said estate, except that he owed it nothing, and that his accounts settled by the proper officer would shew it, as they did. These circumstances, together with the belief that the bail taken made these respondents secure, put them at ease. Indeed, there was nothing left them to do for further relief, when, to their surprize, they accidentally learned that in the suit aforesaid the com'r had reported heavy balances as due from said Edmund to his testator's estate. The taking of said account was attended to by no person. Def't Fitzgerald resided, as he now does, in the State of Mississippi during its taking. The personal representative of the testator was no party to the suit, nor were these respondents parties. The plaintiffs were non-residents of the State, and no party appeared before

said com'r, nor furnished him with any papers or information to enable him to take the said account. He proceeded on the accounts formerly taken, with the addition of the proceeds of the sale of testator's land. These respondents have been unable, unassisted by said Edmund Fitzgerald, so to acquaint themselves with the condition of the testator's estate as to enable them to detect many errors in the account returned by Com'r Neal, but they state and rely that debts due from the testator have not been included in said settlement, as, among others, a debt claimed from testator's estate, by the ex'or of Robert Easly, dec'd, which is now involved in a suit pending in this honorable court, and various other debts which they have reason to believe are due from the said estate. They have every reason to believe that the said Edmund Fitzgerald must have paid money to the pl't's, or one of them, and let them have property of which no account was taken and no credit given by the pl't's, and before the ex'or of said testator, or these respondents, his sureties, can be subjected to any claim of the legatees of said testator,

they are advised that the account of Coalman D. Bennett, sh'ff
54 of said county, and, as such, administrator de bonis non, with his will annexed, must be settled, and also that any sum which said executor may be responsible for must pass into the hands of said administrator, who alone has the right to bring the said executor to a settlement for such assetts as he had when his powers as executor were withdrawn from him, and they insist on the full benefit of this objection. These respondents charge that the said ex'or unlawfully disposed of some of the assetts to purchasers, who are liable therefor, no account whereof has been taken, and they ascertain that, with an opportunity afforded them of procuring vouchers and testimony in existence, they can at least greatly reduce the amount reported against the said ex'or by the com'r who took the account, and that on a full settlement between the ex'or and the pl't's and def't, Martha W. Fitzgerald, they can greatly reduce the amounts reported as due them. Though the said ex'or left with these resp'ts no documents or vouchers to enable them to shew errors in the settlement aforesaid, if they had been parties, they can adduce testimony to shew that said ex'or ought not to be charged with the full amount due from Raleigh White for the land he purchased from said executor, as much of it was paid in the way of set-offs which said White had against the testator's estate, and they not having seen the vouchers on which the settlement made by Com'rs Tredway and Clark, on which the account of Com'r Neal is based, have every reason to believe that some of them were improperly allowed, and that they ought not to be bound by them. These respondents executed their bond as sureties of said ex'or in May, 1860, and many of the items in the accounts aforesaid originated before they became bound, and it was not until now that they have had a right or an opportunity of questioning the settlements aforesaid. If therefore the court shall be of opinion that the pl't's suit can be maintained, these respondents respectfully submit it to the court, to recommit the account returned by Com'r Neal, that an opportunity may be furnished them of having it corrected as to the errors alleged as aforesaid, and any others they may establish. These resp'd'ts have been informed and believe that said ex'or offered to pay to the pl't's what was due them on account of his administration if they would give him the refunding bonds required by law, which they refused or omitted to do; that such offer was made during the late war, and not deeming it safe to hold money, then so rapidly depreciating, he invested it in Confederate securities, which proved worthless by the event of the war, and they submit to this honorable court to decide

whether they are responsible for the assetts so invested. This information is derived from the said ex'or, and they desire an opportunity to establish said fact. And having answered, they pray to be hence dismissed.

JAMES M. WHITTLE, *f. Def'ts.*

55 TOWN OF DANVILLE, *sct:*

Before me, an alderman in and for the town aforesaid, this day personally appeared the within-named William T. Clark and John M. Holland, who severally made oath that they believe the statements made in the foregoing bill to be true.

Given under my hand this 27th day of October, 1868.

W'M E. BOISSEAU, *Ald.*

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 3rd day of June, 1869.

Order of 3d June, 1868.

Coalman D. Bennett, late sheriff of Pittsylvania County, and as such adm'r de bonis non of the estate of William Fitzgerald, dec'd, with his will annexed, is allowed, by consent of parties, to become a party def't in this cause, and thereupon he filed his answer, to which the plt. replied generally. And this cause came on this day to be heard on the papers formerly, the amended bill of the pl't's, the answer of defendant William T. Clark, John W. Holland, and Coalman D. Bennett, adm'r as aforesaid, and was argued by counsel; on consideration whereof, and by consent of parties, the court doth adjudge, order, and decree that the accounts reported as settled by Com'r Neal under the former decree in this cause be recommitted to him to settle the same as to any errors or omissions which any party to this cause may point out or establish. That said com'r do take and settle an account of all money paid or legacies delivered by the aforesaid Edmund Fitzgerald, ex'or of William Fitzgerald, dec'd, to the legatees or devisees under the will of said testator, and an account of def't Bennett, adm'r as aforesaid. The accounts aforesaid are to be reported to this court, with any matter specially stated, deemed pertinent by said com'r, or which either party may require to be so stated.

Answer to C. D. Bennett.

The answer of C. D. Bennett, adm'r of William Fitzgerald, j'r, filed 3 June, 1869, is in these words:

The answer of Coalman D. Bennett, late sh'ff of Pittsylvania County, and as such adm'r de bonis non of William Fitzgerald, dec'd, to a bill exhibited by Caddis Luck and wife against Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, and others, in the circuit court of Pitt'vania County:

This respondent, answering, says that the estate of said tes-
56 tator de bonis non, with his will annexed, was committed to him as sh'ff as aforesaid, for administration; that he has received no assets of said estate, and owes it nothing. That he has no personal knowledge of the matters stated in the bill. He is informed that his

testator's estate owes some debts, the amount of which he does not know, but he claims that all the assetts not administered by said Edmund Fitzgerald, the ex'or, shall come to the hands of this respondent, to enable him to perform his office as adm'r. He has no objection to the settlement of such accounts as the court may order. And having answered, &c.

COALMAN D. BENNETT.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 4th day of Nov'r, 1869:

Order of 4th Nov'r, 1869.

By consent of parties the court doth adjudge, order, and decree that one of the commissioners of this court do take the accounts directed by a decree rendered in this cause at the May term, 1869, it appearing that G. D. Neal, to whom said accounts were directed, has been removed from his office as commissioner in chancery since said decree was rendered and before said accounts were completed; said commissioner shall report, &c.

Report of Comm'r G. D. Neal, under decree of Oct., 1869.

The report of Com'r G. D. Neal, made under the decree of October term, 1869, is in these words:

CADDIS B. LUCK AND MARTHA, HIS WIFE, plaintiff,
against
W'M FITZGERALD'S EX'OR AND OTHERS, defendants.

An account of legacies delivered by Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, to Caddis B. Luck and wife, legatees of the said testator.

1 negro man and family.

COMMISSIONER'S OFFICE,
Pittsylvania Court-House, April 12, 1870.

To the circuit court of Pittsylvania County:

Pursuant to a decree of the circuit court of Pittsylvania County, rendered at its October term, 1869, in a suit in chancery depending therein, between Caddis B. Luck and wife, pl't'ffs, and W'm Fitzgerald's ex'or and others, def'ts, directing one of the com'rs of the said court to take the accounts required to be taken by a decree
57 rendered in this cause by the said court at its May term, 1869, the undersigned commissioner reports to the court that notices were issued against the parties aforesaid; that the 28th day of Feb., 1870, had been appointed at the office of the said com'r as the time and place for taking said accounts; which notices were duly served and are herewith filed. That the parties to this cause having pointed out and established no errors or omissions in the account settled by said com'r under a former decree in this cause, he found it unnecessary to disturb or resettle the same. That it does not appear from the evidence that any money

was paid by the ex'or of the said decedent to the legatees or devisees under the will of the said testator, and that no legacies were delivered to them by the said ex'or, except the legacy stated in the above account, the value of which will appear by reference to statement A, made under a former decree in this cause. That Coalman D. Bennett, the adm'or de bonis non, appeared before your com'r and, being examined upon oath, declares that no assets have ever come into his hands belonging to the estate of the said testator, and that no disbursements have been made by him as adm'or, and that he knows of no assets belonging to the said estate, except those in the hands of the late ex'or.

Your com'r reports specially to the court that James M. Whittle filed with him a fee-bill, against the said Edmund Fitzgerald, late ex'or of the said testator, for the sum of $256.50, subject to a credit of $20, and that C. D. Bennett, the adm'or de bonis non, filed with your com'r a copy of the decree of the circuit court of the said county, rendered at its Oct'r term, 1868, in the suit of W'm Fitzgerald's ex'or, pl't'ff, against Robert Easley's ex'or and others, def'ts, exhibiting a balance decree to be paid to the def't, James S. Easley, executor of the said Rob't Easley, as stated in the said decree, which fee-bill and decree, marked respectively XX and ZZ, not properly coming before your com'r for settlement under this decree, are herewith filed and submitted to the court for its consideration. The account, together with the evidence, decree, notices, and spas., *ir* herewith returned to the court.

Given under my hand, as com'r of the said court, the day and year first aforesaid.

G. D. NEAL,
Commissioner.

Time employed by the com'r in exam'ing papers, settling account, and in writing out report:

10 hours, at 75 c'ts	7 50
Issuing 4 notices and 10 copies, 20 c'ts each	2 80
Taking depositions, 4 hours, at 75 c'ts	3 00
	$13 30
1 spa., 20; postage, 12; fee	32
Charged to plaintiff	$13 62

G. D. NEAL, *Com'r.*

58 *Exceptions.*

This report excepted to; Cannerdy, adm'r of White, admits the payment by White of $270.25 towards the land, which should be credited on White's land bond.

J. M. WHITTLE,
For CLARK & HOLLAND.

22 Ap'l, 1870, before return of rep't.

And at another day, to wit, at a special term of the circuit c't of Pittsylvania County, continued and held at the court-house thereof, Saturday, the 16th day of July, 1870.

Order of 16th July, 1870.

This cause this day again came on to be heard on the papers formerly read, the report of Commissioner Neal, filed April 22, 1870, the exceptions thereto, the exceptions to the report of Commissioner Neal of 10th September, 1867, which exceptions are dated June 30, 1870, and the tes-

timony of witnesses, and was argued by counsel; upon consideration whereof the court doth overrule the exception filed by defendants to the report of Comm'r Neal of 22d April, 1870, and doth confirm said report, and having considered the exceptions filed June 30, 1870, to Commissioner Neal's report of 10 September, 1867, which exceptions are numbered respectively 1, 2, 3, 4, 5, doth sustain exceptions numbered 3 and 4, and doth overrule exceptions numbered 1, 2, and 5, sustaining said report to that extent, and doth adjudge, order, and decree that G. D. Neal, a commissioner of this court, do reform his reports so as to conform to this opinion of the court, ascertaining when the bonds executed for the purchase-money of the land sold by Edmund Fitzgerald, ex'or, commenced to carry interest, and crediting said ex'or with any interest improperly charged in said reports. The court doth further adjudge, order, and decree that said commissioner do take and report an account of the outstanding debts against the estate of W'm Fitzgerald, j'r, dec'd, and in taking this account, notice, by publication once a week for four successive weeks, in a newspaper published in this State, shall be equivalent to personal service on all parties to this suit and to all creditors of said estate.

The report of Com'r G. D. Neal, made under the decree of July special term, 1870, is in these words:

59

60

D'R. *The estate of W'm Fitzgerald, j'r, dec'd, in*

		Principal.	Interest.
1862.			
Mar. 21.	To balance due the ex'or, per report of Commissioner Neal, made Sept'r the 10th, 1867, in the suit of Caddis B. Luck and wife against W'm Fitzgerald's ex'or, &c.....	$1,431 43	$222 98
Oct. 20.	To interest on the above balance.....		49 85
Oct. 20.	To balance due estate from ex'or.....	8,549 05	1,351 17
		$9,980 48	$1,624 00

61

acc. with Ed. Fitzgerald, the ex'or. C'R.

		Principal.	Interest.
1862.			
Oct. 20.	By amount of Rawley White's purchase of land sold by the ex'or under the will of testator on the 19th of Nov., 1857...	$3,982 50	
	By int. on $1,920.25 of the above sum since the 19th of November, 1858.....		$451 56
	By int. on $62.25 of same since Nov. 19, 1858		14 63
	By int. on $1,000 of same since Jan. 1st, 1860		168 16
	By int. on $1,000 of same since Jan'y 1st, 1861		168 16
	By amount of Archer B. Womack's purchase of land sold by the ex'or under the will of testator on the 19th Nov., 1857	4,293 00	
	By int. on $4,293 from the 18th May, 1859		881 49
	By Caddis B. Luck and Martha V., his wife, for this sum, per account settled by the com'r under a decree of the circuit court of Pittsylvania County, rendered at its May term, 1867, in the suit of C. B. Luck and Wife v. William Fitzgerald's ex'or, (see report of com'r under said decree, of date the 10th Sept'r, 1867, and account page 8)	903 06	
	By Martha W. Fitzgerald for this sum per the above-mentioned account, page 8, and report.....	801 92	
		$9,980 48	$1,624 00

62

1862.		
Oct. 20. To Caddis B. Luck and Martha V., his wife, for their distributive share of the estate of the testator, under the construction of his will under a decree of the circuit court rendered at its May term, 1859, in the suit of Edmund Fitzgerald v. Martha Fitzgerald, &c.....	$3,075 62	
To Martha William Fitzgerald for her distributive share of the same, under said decree.....	6,824 60	
	$9,900 22	

D'R. *Caddis B. Luck and Martha V., his wife legatees of W'm Fitzgerald, j'r,*

	Principal.	Interest.
1862.		
Oct'r 20. To this sum, being your proportion of $1,704.98 of debts against the estate directed to be paid ratably on amount received under the will of testator per account current.....	903 06	
20. To balance due from ex'or.....	2,172 56	
	3,075 62	

D'R. *Martha William Fitzgerald, a legatee of W'm Fitzgerald, j'r,*

1862.		
Oct'r 20. To this sum, being your proportion of $1,704.98 of debts against the estate directed to be paid ratably on amount received under the will of testator, per account current.....	801 92	
20. To balance due legatee from executor ..	6,022 68	
	6,824 60	

63

1862.			
Oct. 20.	By balance due estate per debit.....	$8,549 05	$1,351 17
	By int. brought into column of principal for distribution.....	1,351 17	
		$9,900 22	
		$9,900 22	

dec'd, in account with Edmund Fitzgerald, the executor. C'R.

1862.		
Oct'r 20.	By this sum, being your distributive share of testator's estate per account current.....	3,075 62
		3,075 62
1862.		
Oct'r 20.	By balance due legatees per debit....	2,172 56

dec'd, in account with Edmund Fitzgerald, the ex'or. C'R.

1862.		
Oct'r 20.	By this sum, being your distributive share of testator's estate, per account current.....	6,824 60
		6,824 60
1862.		
Oct'r 20.	By balance due legatee per debit.....	6,022 68

64

An account of the outstanding debts due from W'm Fitzgerald, j'r, dec'd, on his estate.

Balance due on debt due James S. Easley, ex'or of Robert Easley, dec'd, the 15th of June, 1858, per statement R E.....	618 76⅔	
Int. thereon to the 8th September, 1870.....	454 06	
		1,072 82
Balance on fee-bill due Ja's M. Whittle.....	256 50	
Interest on $131.50 since June 28, 1858. $96 21		
Interest on $125.00 since April 22, 1858. 92 83		
	189 04	
		445 54
An open account of due John A. Herndon, the 26th October, '68, for.....	25 00	
Interest thereon to September the 8th, 1870.....	2 80	
		27 80
Total amount of outstanding debts, inclusive of interest down to the 8th of Sept'r, 1870.....	1,546 16⅔	

COMMISSIONER'S OFFICE,
Pittsylvania Court-House, Sept'r the 8th, 1870.

To the circuit court of Pittsylvania County:

Pursuant to a decree of the said court, rendered at a special term thereof, on the 16th day of July last, in a suit in chancery therein pending between Caddis B. Luck and wife, pl't'ff, and W'm Fitzgerald's ex'or and others, def'ts, the undersigned comm'r reports to the court that the creditors of W'm Fitzgerald, dec'd, or his estate, and the parties to this decree were duly notified by publication in the Chatham Tribune, that he had appointed the 29th day of August last, at his office, to execute the said decree; which notice is herewith filed. That he reformed the report made in this cause the 10th Sept., 1867, and after ascertaining when the purchase-money for the land sold by the ex'or, belonging to said estate, commenced to bear interest, and after crediting him with the interest improperly charged in said report,
65 finds a balance of $9,900.22, due from said Edmund Fitzgerald, ex'or as aforesaid, to the said estate, of which sum $1,351.17 is interest, which balance your commissioner distributed between the legatees of said testator in pursuance of the construction placed upon his will by the said court at it' May term, 1859, in the suit of the said Edmund Fitzgerald against Martha V. Fitzgerald. That he raised accounts between the ex'or and the said legatees, and on the 20th of October, 1862, finds a balance of $2,172.56 due Caddis B. Luck and wife, and a balance of $6,022.68 due Martha W. Fitzgerald, from the said ex'or.

Your comm'r reports specially to the court that upon an examination of the decree rendered in this cause and the exceptions filed by the defendants to the report of your com'r of the 10th Sept'r, 1867, he finds that there is a discrepancy between the said decree and the endorsement made upon said exceptions; the former sustains the 3d and 4th exceptions and overrules the 1st, 2nd, and 5th, the latter sustains the 2d and 4th exceptions, and overrules the 1st, 3d, and 5th. It is evident

that this discrepancy was the result of inadvertence in drawing up the decree, and that it was the intention of the court in rendering the said decree to sustain the 2d and 4th exceptions and to overrule the others.

Your comm'r therefore in reforming his report of the 10th of Sept'r, 1867, was governed by what he regarded was the evident intention of the court in rendering the said decree. That he made up and completed an account of the outstanding debts against the decedent or his estate, per account page 6, and on the date of this report finds that they amount, inclusive of interest, to the sum of $1,546.16⅔. That it appears from a decree filed as an exhibit in this cause, ma'ked ZZ, that the payment of the debt due Easley's ex'or is upon the condition that a deed be made to the land mentioned in said exhibit. The account, together with the papers, evidence, notice, and, decree, is herewith returned to the court.

Given under my hand as com'r of the said court the day and year first aforesaid.

G. D. NEAL, *Com'r.*

Time employed by the com'r in examining papers, taking evidence, making up accounts, and writing out report, 22 hours, at 75c	16 50
Issuing notice	20
Fees	16 70

Charged to plaintiff.

G. D. NEAL, *Com'r.*

And now at this day, to wit, at a circuit court continued and
66 held for the county of Pittsylvania, at the court-house thereof, on Monday, the 7th day of November, 1870, being the same day and year first herein mentioned.

Final decree.

This cause this day again came on to be heard on the papers formerly read, and the report of Comm'r G. D. Neal, filed 24th September, 1870, and was argued by counsel; upon consideration whereof, it appearing that said report has been filed for more than one month and no exception being taken thereto, the court doth confirm the same; and it appearing from said report that there is a balance of $2,172.56, due the plaintiffs, Caddis B. Luck and Martha V., his wife, as of 20th day of October, 1862, from Edmund Fitzgerald, ex'or of W'm Fitzgerald, j'r, dec'd, and a balance of $6,022.68, as of same date, due from said executor to Martha William Fitzgerald, infant child of William Fitzgerald, j'r, dec'd, for which said balance, with interest from 20th day of October, 1862, the defendants W'm T. Clark and John W. Holland are liable and bound as securities of said Edmund Fitzgerald on his official bond as executor of W'm Fitzgerald, j'r, dec'd; and it appearing also from said report that there are outstanding debts against the estate of said W'm Fitzgerald, j'r, dec'd, amounting on the 8th September, 1870, to the sum of $1,546.16⅔, inclusive of interest to that date; which debts are due to certain creditors hereinafter to be named, with the amounts respectively due to each; and the court being of the opinion that said amount of outstanding debts should be paid by distribution pro rata between said Caddis B. Luck and Martha V., his wife, and said Martha

William Fitzgerald, legatees of said W'm Fitzgerald, j'r, dec'd, under the construction of the will of said testator, by a decree of this court, rendered at its May term, 1859, in a suit in chancery between Edmund Fitzgerald, plaintiff, and Martha Fitzgerald and others, defendants, and that the proportion of said indebtedness to be paid by Caddis B. Luck and Martha V., his wife, is $818.94, with interest from 8 September, 1870, and the proportion to be paid by Martha William Fitzgerald is $727.22, with like interest, doth adjudge, order and decree that the defendants, Edmund Fitzgerald, William T. Clark, and John W. Holland, do deposit in the banking-house of W'm S. Patton, at Danville, V'a, the sum of $1,072.82⅔, with interest thereon from 8th September, 1870, to the credit of James S. Easley, ex'or of Robert Easley, dec'd, taking from said W'm S. Patton a certificate of said deposit and filing the same with the clerk of this court; which said certificate of deposit the said executor of Robert Easley shall be entitled to withdraw from said clerk upon his furnishing such deeds and filing the same with the clerk of this court, as are required to be made and approved by a decree of this court, rendered on the 7th day of November, 1868, in a suit in chancery between Edmund Fitzgerald, ex'or of William Fitzger-
67 ald, j'r, plaintiffs, and James S. Easley, ex'or of Robert Easley, and others, defendants; that said defendants, Edmund Fitzgerald, William T. Clark, and John W. Holland, do pay to James M. Whittle the sum of $445.54, with interest thereon from 8th September, 1870; to John A. Herndon, $27.80, with like interest; which payments aforesaid amount to $1,546.16⅔, with interest to 8th September, 1870, aggregating the ascertained outstanding indebtedness of the estate of W'm Fitzgerald, j'r, dec'd.

The court doth further adjudge, order, and decree that the defendants, Edmund Fitzgerald, William T. Clark, and John W. Holland, do pay to Caddis B. Luck and Martha V., his wife, the sum of $2,172.56, with interest from 20 October, 1862, less the sum of $818.94, with interest from 8th September, 1870, and to Caddis B. Luck, g'd'n of Martha William Fitzgerald, or any proper guardian, the sum of $6,022.68, with interest from 20th October, 1862, less the sum of $727.22, with interest from 8th September, 1870, and that the said defendants, Edmund Fitzgerald, W'm T. Clark, and John W. Holland, pay to the plaintiffs their costs by them about their suit in this behalf expended, and the plaintiffs, Luck and wife, and Lewis D. Crenshaw, their assignee, having executed and filed in the papers of this cause an agreement, marked X, as to the terms on which a decree is to be entered in this suit, the court directs that the same be regarded in the issuing of execution on this decree, and that the same be issued in conformity thereto.

The following are copies of depositions taken and filed in this cause by the defendants:

Deposition of Caddis B. Luck.

The deposition of Caddis B. Luck, taken 5th March, 1870:

CADDIS B. LUCK, being introduced as witness by the plaintiffs, being first duly sworn, deposeth and saith:

Question by J. M. Whittle, counsel for the defendants, Clark and Holland. State all the property which yourself or your wife (the female plt.) ever received from Edmund Fitzgerald, as ex'or of William Fitzgerald, j'r.

Answer. A negro man and family were all the property which I and my wife ever received from Edmund Fitzgerald.

By same. Did you not receive all the negro property which your wife was entitled to from said estate?

Ans'r. I did.

By same. State whether or not your wife or yourself ever received from said ex'or any money or other property besides that above mentioned.

Answer. Never one dollar or cent's worth.

By same. Did yourself or your wife ever execute a refunding bond to said ex'or, or offer to do so?

Answer. Never.

68 And further this deponent saith not.

C. B. LUCK.

I agree to the reading of above dep. without being sworn to.

W'M M. TREDWAY,
Counsel for Pl'ff's.

MARCH 4, 1870.

Deposition of Martha V. Luck.

The deposition of Martha V. Luck, taken 5 March, 1870:

Question by counsel for def'ts. State all the personal property which you ever received from Edmund Fitzgerald as ex'or of your former husband, William Fitzgerald, dec'd.

Answer. I received a negro man and children, which were all the property I ever received.

By same. State whether or not Edmund Fitzgerald and yourself agreed to divide the land willed by William Fitzgerald's will between yourself and your child.

Answer. No; we never had any agreement.

By same. Was not a dividing line run thro' said land by agreement between you?

Answer. No, sir.

By same. State whether or not you ever received any money or personal estate of any kind from said ex'or except the slaves.

Answer. No, sir.

And further this deponent saith not.

VIRGINIA M. LUCK.

Deposition of C. D. Bennett.

The deposition of Coalman D. Bennett, taken 8 March, 1870:

Question by com'r. State whether or not you are administrator de bonis non of the estate of W'm Fitzgerald, dec'd; and, if so, state whether or not any assets ever came to your hands belonging to said estate.

Answer. I am adm'r. No assets belonging to said estate have ever come into my hands.

Question by same. State if you know of any assets belonging to said estate due and uncollected.

Answer. I do not know of any except the balance due from Edmund Fitzgerald, the former executor.

And further this deponent say'th not.

COALMAN D. BENNETT.

69 *Deposition of James S. Easley.*

The deposition of James S. Easley, taken 20 May, 1870:

Question by said def't. State whether or not any sum or sums of money were paid you as ex'or of Robert Easley, dec'd, on acc. of land purchased by William Fitzgerald, now deceased, from your testator in his life-time; if so, what sums were paid, and by whom, and when were said payments severally made?

Answer. By reference to my book I find three different amounts entered to the credit of a bond of William Fitzgerald, and securities to Robert Easley, for the purchase of land of Robert Easley, to wit, on the 14th July, 1858, the sum of thirteen hundred and seven dollars; on the 6th September, 1858, the sum of one hundred and sixty-seven dollars, and on the 1st March, 1859, the sum of sixty dollars. The two last payments were made by Elisha Barksdale, j'r, but I am unable to say who made the first.

Quest. by said def'ts. Have you or not any doubt that the payments of money aforesaid were actually made to you as you have stated?

Answer. I have not.

And further this deponent saith not.

JAMES S. EASLEY.

Deposition of Archer B. Womack.

The deposition of Archer B. Womack, taken 23 May, 1870:

Question by the def'ts. State if you know when the lands of the late W'm Fitzgerald, dec'd, whose ex'or was Edmund Fitzgerald, were sold by said ex'r.

Answer. A part of said land was sold on the 18th of November, 1857, about 350 acres. I do not know the date of the sale of the remainder of the land.

Question by the same. Who bought said lands at said sales?

Answer. A. B. Womack purchased above-mentioned 350 acres, and Dr. Rawley White purchased the balance.

Question by the same. State whether or not any credit was given for the purchase-money.

Answer. Credit of one, two, and three years was given on the purchase of A. B. Womack. I do not know what credit was given on White's purchase.

Question by the same. At what time did interest on said purchase-money commence?

Answer. Interest on the purchase-money of A. B. Womack commenced 18th Nov'r, 1858. I do not know anything about the date of the beginning of interest on White's purchase.

And further this deponent saith not.

ARCHER B. WOMACK.

70 *Deposition of W'm Wimbish.*

The deposition of W'm Wimbish, taken 26th May, 1870:

Question by said def'ts. State whether or not you are aware of the payments of any monies to you by Edmund Fitzgerald, ex'or of W'm Fitzgerald, j'r, dec'd?

Answer. Yes, I am.

Question by same. State the dates and amounts of said payments.

Answer. First, Dec'r 31, 1858, he paid sixty-three dollars and forty-five cents; second, March 31st, 1859, he paid forty-three dollars and seven cents; third, March 21, 1859, he paid one hundred and one dollars and seventy-four cents; fourth payments, M'ch 21, 1859, thirty-two dollars and twenty-three cents.

Quest. by same. State on whose account said payments were made to you.

Answer. The first to the credit of W'm Fitzgerald, j'r, dec'd; the second to the same; the third to the credit of M'r's M. V. Fitzgerald, widow of W'm Fizgerald, j'r, dec'd; fourth to credit of W'm Fitzgerald, j'r, dec'd, estate.

Quest. by same. State whether or not the bond executed by Raleigh White to Edmund Fitzgerald, ex'r of W'm Fitzgerald, j'r, dec'd, on the 19th day of May, 1858, for $1,000, payable on the 1st day of July, 1859, to which you were a witness, and a copy of which is hereto appended, marked A, was given for the purchase of lands of the estate of W'm Fitzgerald, sold by Edmund Fitzgerald, ex'or of said dece'd to said Raleigh White.

Answer. Yes, it was.

And further this deponent saith not.

W'M WIMBISH.

Exhibit A refer'd to in depo. of W'm Wimbish.

Exhibit A referred to in deposition of W'm Wimbish, is in these words:

Copy of bond A.

$1,000. On the 1st day of July, 1859, I, Raleigh White, do promise and oblige myself, my heirs, &c., to pay to Edmund Fitzgerald, j'r, executor of W'm Fitzgerald, j'r, deceased, or assigns, the sum of one thousand dollars, lawful money of Virginia, for value received.

Witness my hand and seal this 19th day of May, 1858.

RALEIGH WHITE. [SEAL.]

Witness:

W'M WIMBISH.

71 *Deposition of Jno. E. Kennedy.*

The deposition of Jno. E. Kennedy, taken 11th July, 1870:

Question by def't's counsel. State whether or not you know the terms on which Raleigh White, dec'd, purchased lands from Edmond Fitzgerald, as ex'or of William Fitzgerald, dec'd; if so, state the time of such purchase and the terms.

Answer. He bought in the fall of 1857. I think the last bond was due in 1860, and that was the only bond upon which he was to pay interest. One payment was made in money and in claims Rawley White had against William Fitzgerald.

By same. Was or was not W'm Fitzgerald indebted to said White at the time of the death of said Fitzgerald; if so, how much?

Answer. I think William Fitzgerald owed him about $400 (four hundred dollars) at that time.

By same. Did or did not any part of the purchase-money of said land bear interest for the first twelve months after the purchase?

Ans'r. I feel confident it did not.

By same. Was or was not the bond of said White for $1,000 filed with the answer of def't, Barksdale, given in part of the purchase-money of said land?

Answer. It was.

By same. State whether or not a paper filed, marked XX, is a statement of the purchase-money agreed to be paid for said land by said White, and in whose handwriting it is, if you know it.

Ans'r. It is; and I think it is in the handwriting of W'm Wimbish.

By same. State whether or not the payment made by Edmond Fitzgerald to Rawley White, which you have spoken of in your answer to the first question, included the whole claim of Rawley White against William Fitzgerald.

Answer. I think it did.

And further this deponent saith not.

JOHN E. KENNEDY.

Exhibit XX, referred to in deposition of John E. Kennedy, is in these words:

398¼ acres land, @ $10 ..... $3,982 50

C'R.

Cash	$200 00	
Acc't	370 25	
Cash	1,000 00	
Cash	350 00	
		$1,920 25
		$2,062 25
Due-bill on dem'd	$62 25	
Bond due 1st July, 1859	1,000 00	
Bond due 1st July, 1860	1,000 00	
		$2,062 25

72 *Deposition of Elisha Barksdale.*

The deposition of Elisha Barksdale, taken 11th July, 1870:

Quest. by def'ts' att'y. State whether or not the paper marked XX, filed, contains a statement of the terms on which Rawley White purchased land from Edmond Fitzgerald, ex'or of William Fitzgerald.

Answ'r. I have examined the paper referred to. The paper is in the handwriting of W'm Wimbish, a merchant, who resided at the time near Rawley White; and from the paper, and the inspection of a bond dated the 19th of May, 1858, for $1,000, executed by Rawley White to Edmond Fitzgerald, executor of William Fitzgerald, payable 1st July, 1859, and from my recollection of the transactions at the time, I am satisfied that the paper marked XX does contain a statement of the terms on which said White purchased the land of Edmond Fitzgerald, ex'or of W'm Fitzgerald. The bond payable 1st July, 1859, was paid to me; and I think it more than probable that I was present when the bond due 1st July, 1860, was paid; I know I have seen the bond, and I think it more that probable that I made the settlement with Fitzgerald for Rawley White. My impression is that neither bond carried interest.

By same. Where is Edmond Fitzgerald now?

Ans'r. He left this country during the late war—what year I do not remember. I have been informed that he resides in the State of Mississippi.

By same. State whether or not you know positively that the bonds given by Rawley White for the purchase of lands above mentioned did not bear interest until the same became due.

Ans'r. I do.

ELISHA BARKSDALE, J'R.

A copy of the record. Teste:

JOHN L. HURT, *Clerk.*

Exhibit G, referred to in pl'ffs' Clarke & Holland's bill.

Exhibit G, referred to in plaintiffs' Clarke & Holland's bill, is in these words:

In the name of God, amen. I, Raleigh White, of Pittsylvana County, Virginia, being of sound mind and disposing memory, do make and publish my last will and testament, in manner and form following, viz:

First. I desire that all my just debts be paid, and I hereby direct my executors to send the following slaves to the South to be sold for that purpose, if necessary, namely: Claiborne, Mary and her two youngest children, and Betsy.

73 Second. I give to the Rev. John Early, of the town of Lynchburg, Virginia, the tract of land in Pittsylvania County, near Peytonsburg, called the tan-yard tract, which I bought of Doct. Randolph V. Barksdale, containing about one hundred acres, more or less, with all the appurtenances thereto belonging, to have and to hold the same in trust for the sole use and benefit of Martha Kennedy, during her life, and at her death to go to her daughter, Sarah H. Kennedy, as herein directed. I also give to the said John Earley that portion of the tract of land on which I now reside, which formerly belonged to my father, and on which the mansion house stands, containing about five hundred acres, with all the appurtenances thereto belonging, to have and to hold the same in trust for the sole use and benefit of the said Martha Kennedy, until her daughter, the said Sarah H., arrived at the age of twenty-one years, and then to go to the said Sarah H., as herein directed. I also give to the said John Early two thousand five hundred dollars' worth of slaves, to be allotted to him by valuation, to have and to hold the said slaves in trust for the sole use and benefit of the said Martha Kennedy, during her life; and at her death I desire that the said slaves may be equally divided between her three children, Caroline A. Kennedy, John E. Kennedy, and Sarah H. Kennedy, which I give to them—the said Caroline A., John E., and Sarah H. Kennedy—during their lives, and at their death, to their children, their heirs, &c., forever.

Third. I give to the said Caroline A., John E., and Sarah H. Kennedy, during their lives, and at their deaths to their children, their heirs, &c., forever, the balance of my slaves not otherwise disposed of, to be equally divided between them, the said Caroline A., John E., and Sarah H.

Fourth. I give to the said Sarah H. Kennedy, during her life, and at her death to her children, their heirs, &c., forever, the tract of land on which I now reside, containing eleven or twelve hundred acres, with all the appurtenances thereto belonging, being made up of the mansion-house tract that formerly belonged to my father, the tan-yard tract bought of Doct. Randolph V. Barksdale; the tract conveyed to me by John Jones, trustee for Thomas Williams and others; the tract bought

of Stephen C. Townes, trustee for Thomas Williams and others; the land bought of John B. Terry, and the land bought of Abner C. Waldron, subject to the estate herein bequeathed to the Rev. John Early for the use and benefit of Martha Kennedy, in the tan-yard tract and the old original mansion-house tract.

Fifth. I give to the aforesaid John E. Kennedy, during his life, and at his death to his children, their heirs, &c., forever, my grist-mill in Pittsylvania County, on Banister River, and the tract of land on which it stands, containing about sixty-six acres, more or less, including about twenty acres bought of the heirs of Thomas Anderson, together with all the tools at said mill, and the stock of cattle and hogs kept there. And I hereby direct my executors to have a good and sub-
74 stantial saw-mill erected and built at said grist-mill, to supply the place of one recently burned down, to be paid for out of my estate, but for the sole benefit of the said John E. Kennedy. I also give to him, the said John E. Kennedy, in like manner, my land on Banister River, opposite said mill, being a tract of about two hundred and eighty-seven acres, more or less; and one-half my tract of land in Pittsylvania County near Good Hope old meeting-house, containing near or about six hundred acres, being the lands bought of John and Thomas J. Boyd and Anne Whitlock.

Sixth. I give to the aforesaid Caroline A. Kennedy, during her life, and at her death to her children, their heirs, &c., forever, the tract of land which I bought of the heirs of Rawley Thompson, containing between six and seven hundred acres, lying in Pittsylvania Count', on the north side of Banister River, near and below Riceville, and the land bought of Martha Thompson, widow of Sam'l Thompson, adjoining the aforesaid tract, and containing about two hundred acres, more or less, and the remaining half of my tract of land near Good Hope old meeting-house.

Seventh. I desire that my household and kitchen furniture may remain and continue at my house for the use and benefit of the aforesaid Martha Kennedy and her three children aforesaid, namely, Caroline A., John E., and Sarah H. Kennedy, and that it may ultimately be given to the said children, whenever and in such manner as the said Martha Kennedy may choose.

Eighth. I desire that my stock of horses, sheep, and the residue of my stock of cattle and hogs not otherwise disposed of, together with all the balance of my personal estate not otherwise disposed of, may be sold by my executors; and I hereby direct them to furnish the aforesaid Martha Kennedy with sufficient sums of money from time to time as may be necessary to pay for the board, clothing, and tuition of her daughter, the aforesaid Caroline A. Kennedy, until her education is completed, and to pay any arrearages that may be due and unpaid by her board, clothing, and tuition at the time of my decease.

Ninth. I give and bequeath to the aforesaid Caroline A., John E., and Sarah H. Kennedy all my land in the State of Ohio, being a tract of about three hundred and sixty-seven acres, in Union County, besides about one thousand acres in said county about which there is an existing controversy, and which may or may not be recovered, together with all the residue of my estate, of whatever it may consist, whether real or personal, not otherwise disposed of, to be equally divided between them, to them, the said Caroline A., John E., and Sarah H. Kennedy, or to the survivor or survivors, should either of them die without issue, their heirs, &c., forever.

Tenth. At the death of either the aforesaid Caroline A., John E., and

Sarah H. Kennedy without issue, I give to the survivors, in equal proportions, or to the sole survivor should two of them die without
75 issue, during their lives, and at their deaths to their children, their heirs, &c., forever, all the estate herein bequeathed to such decedent (or decedents) for life, and then to their children.

Lastly, I constitute and appoint my friends, Richard Jones and Coleman D. Bennett, both of Pittsylvania County, executors of this my last will and testament, hereby revoking all other or former wills or testaments by me heretofore made.

In witness whereof I, the said Raleigh White, have hereunto set my hand and seal this 19th day of April, 1853.

RALEIGH WHITE. [SEAL.]

Signed, sealed, and acknowledged before—

JA'S A. LUCK.
WILLIAM ADAMS.
D. CHALMERS, 3d April, 1855.
J. W. HENRY, 3d Ap'l, 1855.

Codicil the 1st.

I desire and direct my executors to send to the South, to be sold, two of my negro men, namely, Edmund and Matthews. And I also desire them to sell, in any way they may deem most expedient, a lot of my land in Halifax County, near Concord, containing three acres, which I purchased of the heirs of my father, Rawley White, being the land which he, the said Rawley White, purchased of Daniel Clay. I also direct my said executor to sell, in like manner, two unimproved half-acre lots in the town of Meadsville, Halifax County, one of which I purchased of the heirs of Elisha Spraggins, and the other of the heirs of H. H. Barksdale, but for which, and the aforesaid lot of three acres of land, I have no recorded title. And should it still be necessary to raise more funds, then I direct the sale of the remaining negroes directed to be sold in the first clause of my will. And having purchased, since the execution of the foregoing will, a tract of land of Thomas H. Wooding, trustee for John Blanks and others, lying in Pittsylvania County and adjoining the tract of two hundred and eighty-seven acres opposite my mill on Banister River, and bequeathed to John E. Kennedy and his children, and containing one hundred acres, or thereabout, being the land on which the aforesaid John Blanks lately resided, I hereby give and bequeath the said land to the aforesaid John E. Kennedy, during his life, and at his death to his children, their heirs, &c., forever.

Witness my hand and seal this 30th day of March, 1855.

RALEIGH WHITE. [SEAL.]

Witness:

JA'S A. LUCK.
WILLIAM ADAMS.
DANIEL CHALMERS, 3d April, 1855.
J. W. HENRY, 3d Ap'l, 1855.

76 I, Raleigh White, do make this codicil to my will. I hereby direct that all the property, real and personal, bequeathed and devised by me in the foregoing will to Caroline Kennedy, now Caroline Davis, shall be taken and held by Thomas H. Kennedy, for the separate use and benefit of the said Caroline Davis and her children, and that the said

property shall not be subject to the debts, contract, or control of her husband. Witness my hand and seal, this 8th day of February, 1861.

his
RALEIGH × WHITE. [SEAL.]
mark.

Witness:

J. T. COLES.
E. BARKSDALE, J'R.

I, Raleigh White, of the county of Pittsylvania, having heretofore, to wit, on the 19th day of April, 1853, made my will, republished the same on the 3d day of April, 1855, together with a codicil thereto, dated 30th March, 1855, also republished on the said 3d April, 1855, and having also made and published a second codicil to the same on the 8th day of February, 1861, do hereby make and publish the following as a third codicil to my said will, ratifying and confirming all that has been heretofore done in relation to my said will, viz:

Since the making of my said will, I have purchased of Robert Adams a tract of land containing about one hundred acres, which he purchased of W'm and John Walden, some 8 or 10 years ago, and bound as described in this deed to him. For this tract I have *have* paid in full and have the receipt, but have as yet no deed, as he is in the army at Manassas, in the service of the State. When a deed is made by him and wife, it is not to operate against this device hereinafter made, but in confirmation thereof. I have also, since my will, purchased of W'm Fitzgerald's estate another tract of land, containing about 400 acres, or nearly, and for which a deed has been made. Now, in relation to these two tracts of land, which could not pass under my said will, I now will, devise, and bequeath the same to Sarah H. Kennedy, under the same limitations, provisions, and restrictions, and to the same persons at her death, as I have heretofore, in the fourth clause of my said devised other real estate therein mentioned to the said Sarah H. Kennedy, which said two tracts are to go to her, in the same manner and effect as if I had been the owner thereof at the making of my said will, and had then inserted a devise of them in said fourth clause, together with the lands therein devised to her November 11, 1861.

his
RALEIGH × WHITE. [SEAL.]
mark.

77 Acknowledged and signed before us, witnesses, present at the same time, and witnessed in his pre*fer*ence.

JA'S A. LUCK.
JOSEPH E. ANDERSON.

At a county court held for the county of Pittsylvania, on the 21st day of December, 1863:

The last will and testament of Raleigh White, dec'd, and codicils were brought into court by Richard Jones and C. D. Bennett, the executors, in order to be proved; whereupon came Tarpley White, by his attorney, and on his motion he is made a party contestant, and the motion is continued at his costs till the next term.

And at another day, to wit, at a county court held for the county of Pittsylvania, on the 18th day of January, 1864:

This day came the parties, by their attorneys; whereupon came John L. White, Richard White, Chesley Martin, and Rebecca M., his wife,

Macha Poindexter, and Raleigh W. Wytten, Thomas Wytten, and Joanna Cunningham, children of Ellen Wytten, dec'd, and on their motion they are admitted parties contestants, and for reasons appearing to the court the motion is continued till the next term.

And at another day, to wit, at a county court held for the county of Pittsylvania, on the 15th day of February, 1864:

For reasons appearing to the court, it is ordered that this motion be continued till the next term at the costs of the contestants.

And at another day, to wit, at a county court continued and held for the county of Pittsylvania, on the 22d day of March, 1864:

This day again came the parties, by their attorneys, and sundry witnesses being sworn and examined, and the court, not having heard all the evidence, doth postpone the further consideration of said motion till to-morrow morning, ten o'clock.

And at another day, to wit, at a county court continued and held for the county of Pittsylvania, on Wednesday, the 23d day of March, 1864:

This day again came the parties, by their attorneys, and sundry witnesses being sworn and examined, and the court, not having heard all the evidence, doth postpone the further consideration of said motion till to-morrow morning, nine o'clock.

And at another day, to wit, at a county court continued and held for the county of Pittsylvania, on Thursday, the 24th day of March, 1864:

This day again came the parties, by their attorneys, and the court having heard all the evidence and the arguments of counsel for
78 and against said motion, the court doth consider that the writing bearing date the 19th day of April, 1853, purporting to be the last will and testament of Raleigh White, deceased, is the last will and testament of the said Raleigh White, deceased, and that the three codicils thereto annexed, one dated the 30th day of March, 1855, another dated the 8th day of February, 1861, and another dated 11th of November, 1861, are the codicils of the said White, attached to his said will, and doth order that the said will and codicils be recorded, and doth order that the plaintiffs recover against the contestants their costs by them in this behalf expended, occasioned by their opposition. From which judgment and order, admitting the said will and codicils to probate, the contestants do appeal therefrom, and the court doth fix the penalty of the appeal bond to be given at one thousand dollars; whereupon the said Tarpley White and Richard White, with John W. Poindexter and Coalman D. Bennet as their sureties, entered into and acknowledged said bond in the penalty of one thousand dollars, conditioned according to law.

Teste:

L. SCRUGGS, *Clk.*

At a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on the 1st day of June, 1864, as a court of law:

TARPLEY WHITE AND OTHERS, APPELLANTS,
vs.
RALPH WHITE'S EX'ORS, APPELLEES.

Upon an appeal from the decision of the county court of Pittsylvania, made on the 24th day of March, 1864, admitting to probate the will and codicils of Raleigh White, deceased.

This day the appellees moved the court to dismiss the appeal aforesaid because no such appeal bond had been executed by the appellants as is

required by law; which motion was overruled by the court, because it appeared to the court that the said bond was signed by the same Coalman D. Bennett, who is one of the appellees, and the said bond, if defective, was thus sanctioned by him, and that he could not, after having in this way sanctioned, object to it in this court.

Memo.—On trial of this motion, it was proved by the said Coalman D. Bennett, that when the will of the said Raleigh White was admitted to probate in the county court, that he declared his intention not to qualify as executor, and that Richard Jones had expressed the same intention, and that he, the said Bennett, never intended to act as ex'or. And

79 on the further motion of the said appellees, the court doth order that the appellants be summoned to appear here on the first day of the next term of this court, to show cause why the said appeal shall not be dismissed, because no appeal bond was executed by them in said case before the final adjournment of the said county court at the term at which the said will, &c., was admitted to probate, and because the appeal bond now in the records was signed by the obligors in blanks, and that the blanks were not filled till after the end of the said term of the said county court.

On the motion of the appellants, who are the heirs at law of Raleigh White, deceased, it is ordered that John Earley, trustee for Martha Kennedy, the said Martha Kenned', Thomas H. Kennedy, trustee for Caroline Davis, John E. Kennedy, Flipcher Davis, and Caroline Davis, his wife, and Sarah H. Kennedy, the last named of whom is an infant under the age of 21 years, be summoned to appear here before the court now sitting, to shew cause why the writing bearing date the 19th day of April, 1853, and the codicils thereto annexed, the 1st dated the 30th day of March, 1855, the second dated the 8th February, 1861, and the 3rd dated the 11th November, 1861, should be admitted to record as the last will and testament of Raleigh White, deceased, and it is ordered that John E. Kennedy be appointed guardian ad litem to the said Sarah H. Kennedy, to defend her rights in this controversy: whereupon the said parties, John Earley, trustee for Martha Kennedy, Martha Kennedy, Thomas H. Kennedy, trustee for Caroline Davis, John E. Kennedy, Fletcher Davis, and Caroline Davis, his wife, Sarah H. Kennedy, by John E. Kennedy, her guardian ad litem, appeared in open court and waived notice. Whereupon it is ordered that the said last-named parties be made parties appellees in cause, it appearing to the court that they and the appellants are all the persons enterested in this controversy; and it is further ordered that all testamentary papers of the said Raleigh White, dec., be produced before this court on the trial of this motion; and on the motion of the appellants, by counsel, ordered that a jury be impannelled at the bar of this court, to ascertain whether any, and if any, which, of the papers produced before said jury be the will of said decedent Raleigh White, and that the trial of the said issue be cont'd at the costs of the appellants till the next term.

At another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 1st day of November, 1864, as a court of law:

This day came the parties, by their attorneys; and thereupon the parties being fully heard upon the rule against the appellants to shew cause why the said appeal should not be dismissed because the appeal bond in this cause was not executed by the appellants before the final adjournment of the county court at which the said will and codicils were admitted to probate, and because the said bond was executed in blank by

the said obligors, and said rule being fully argued by the counsel
80 of the parties: Upon consideration whereof the court doth discharge the said rule. And a jury, to wit, Smithson H. Law, Moses Adams, Eppy N. Brumfield, W'm Walker, W'm McCrickand, Tunstall W. Shelton, John R. Craft, Hughes Walker, Erastus Walker, Demarcus L. Anderson, Ellis Giles, and Pyrant Easley, being selected, tried, and sworn well and truly to ascertain whether any, and if any, which, of the papers produced before the said jury be the will of the said decedent, Raleigh White, deceased, and having heard part of the evidence, was adjourned till to-morrow morning, half after eight o'clock.

At another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 2d day of November, 1864:

This day again came the parties, by their attorneys, and the jury sworn in this cause on yesterday appeared in court according to their adjournment, and, having heard only a part of the evidence, were adjourned till to-morrow morning, nine o'clock.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 3d day of November, 1864, as a court of law:

This day again came the parties, by their attorneys, and the jury sworn in this cause appeared in court pursuant to their adjournment, and, not having heard all the evidence, were adjourned till to-morrow morning, nine o'clock.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Friday, the 4th day of November, 1864, as a court of law:

This day again came the parties, by their attorneys, and the jury sworn in this cause appeared in court according to their adjournment, and, having heard all the evidence and arguments of counsel, were sent out of court to consult of their verdict, and after some time returned into court and declared they could not agree in a verdict; the court doth therefore order that the said jury be adjourned till to-morrow morning, nine o'clock.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Saturday, the 5th day of November, 1864, as a court of law:

This day again came the parties, by their attorneys, and the jury sworn to try this cause appeared in court according to their adjournment, were sent out of court to consult of their verdict, and after some time returned into court and declared they could not agree in a verdict; whereupon, by consent of parties, Pyrant Easley, one of the jury, is withdrawn, and the rest from rendering a verdict discharged, and the trial of the issue is deferred till the next term for a new trial to be had therein.

81 And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Monday, the 4th day of June, 1866:

For reasons appearing to the court, it is ordered that this cause be continued till the next term at the cost of the appellants.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Friday, the 8th day of June, 1866, as a court of law:

On the motion of the appellees, and it appearing to the court that James

A. Luck, an attesting witness to the said will, is unable from sickness' age, and infirmity to attend this court to testify, the court doth order that the clerk of this court do issue a commission to take his deposition, annexed to said will-, directed to any person authorized by law to take deposition in other cases.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Monday, the 29th day of October, 1866:

For reasons appearing to the court, it is ordered that the sheriff of this county summon twenty qualified jurors, free from just cause or exception, to attend here Monday next as jurors for the trial of this cause.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Friday, the 9th of November, 1866, as a court of law:

This day came again the parties by their attorneys, and a jury, to wit: W'm H. Linthicum, A. F. Hatchett, W'm Moses, Geo. B. Cook, W'm S. Gallaway, Thomas C. Lewis, Jere. H. Graves, Harvey J. Cole, Alfred Anderson, John E. Lanier, John J. Glenn, and J. M. Parish, being selected by ballot and sworn well and truly to try whether any, and if any, which, of the papers produced before them be the will of said decedent, Raleigh White, upon their oath do say: "We, the jury, find that the paper writings purporting to be the last will and testament of Raleigh White, dated 19th day of April, 1853, and the codicil dated 30th March, 1855, the codicil dated 8th February, 1860, and with the codicil dated 11th November, 1861, is the true last will and testament of the said Raleigh White, deceased." Therefore, it is considered by the court that the said will and codicils mentioned in the said verdict be recorded as the true last will and testament of the said Raleigh White, deceased; and by consent of parties by counsel, it is ordered that the appellees pay to the appellants their costs by them about their appeal in this behalf expended.

Teste:

JOHN L. HURT, *Clerk*,

A copy. Teste:

JOHN L. HURT, *Clk.*

82 And said plaintiffs filed an affidavit in these words:

Affidavit for order publication.

In the clerk's office of the circuit court of Pittsylvania County.

James M. Whittle this day personally appeared in said office and made oath that Caddis B. Luck and Martha V., his wife, Martha W. Fitzgerald, and Edmund Fitzgerald, late ex'or of W'm Fitzgerald, dec'd, and def'ts in a suit in said court, wherein W'm T. Clark and John W. Holland are pl't'ffs, do not reside in the State of Virginia, to the best of his knowledge and belief.

Given under my hand January 19th, 1869.

JOHN L. HURT, *Clerk.*

And an order of publication was awarded, which with the certificate of the editor, is in these words:

Order of publication.

STATE OF VIRGINIA, *to wit:*

At rules held in the clerk's office of the circuit court for the county of Pittsylvania, at the court-house thereof, on Monday, the first day of Feb'y, 1869.

W'M T. CLARK AND JOHN W. HOLLAND, plaintiffs,
against
CADDIS B. LUCK AND MARTHA V., HIS WIFE, Martha W. Fitzgerald, Coalman D. Bennett, late sheriff of Pittsylvania County, and as such administrator de bonis non of W'm Fitzgerald, j'r, dec'd, with his will annexed, Edmund Fitzgerald, late ex'r of said W'm Fitzgerald, Griffeth D. Neal, Richard Jones, Elisha Barksdale, j'r, and John Cannady, adm'or with the will annexed of Raleigh White, dec'd, def'ts. } In chancery.

It appearing by affidavit filed that the defendants, Caddis B. Luck and Martha V., his wife, Martha W. Fitzgerald and Edmund Fitzgerald, late ex'or of W'm Fitzgerald, dec'd, do not reside in the State of Virginia, it is ordered that they appear here within one month after due publication of this order and do what is necessary to protect their interest in this suit, the object of which is to have the accounts of Edmund Fitzgerald, j'r, ex'or of W'm Fitzgerald, j'r, dec'd, resettled, and to give the sureties of said Fitzgerald as such ex'or, who are plaintiffs in this motion, credit by certain amounts which without their consent and against his duties as ex'or he has made himself chargeable with.

Extract. Teste:

JOHN L. HURT, *Clerk*,
JAMES M. WHIPPLE, *p. q.*

Fe. 24—4t.

83 *Editor's certificate.*

I, Abner Anderson, editor of the Danville Register, a newspaper published in the town of Danville, V'a, do hereby certify that the above notice has been published in said newspaper four successive weeks, from the 24th day of Feb'y, 1869.

Given under my hand this the 27th day of May, 1869.

ABNER ANDERSON.

Printer's fee, $8.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Tuesday, the 1st day of June, 1869—

Order of 1st June, 1869.

On motion of G. D. Neal, by counsel, and on like motion of R. Jones, and by leave of the court, they filed their separate answers in this cause; to which the plaintiffs replied generally.

The answer of G. D. Neal, filed 1st June, 1869, is in these words:

Answer of G. D. Neal.

The seperate answer of Griffeth D. Neal to a bill of complaint exhibited in the circuit court of Pittsylvania County by William T. Clark and John W. Holland against this respondent and others.

This respondent, reserving to himself the benefit of all just exceptions to the said bill, says the same is not sufficient in law to charge this respondent. And proceeding to answer said bill, or such parts thereof as he is advised it is material for him to answer, but not waiving his said demurrer, this respondent says it is true that this resp't purchased of Edmund Fitzgerald, in the summer of 1859, two bonds, one of them for $1,000 and the other for $2,293, for $513 less than the amount of said bonds; about the same time this resp'd't sold said bonds to Richard Jones, separately, for *for* the $1,000, including the int. on. I received $980; for the $2,293 bond I received $2,076.

This resp'd't does not *not* recollect that, at the time he purchased these bonds, his attention was directed to the fact that they were executed to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd. He knew that Edmund Fit'gerald, with whom he was dealing, was a man of very considerable estate; did not doubt that he was acting properly, and considered him able to make good all his contracts.

This resp'd't, at the time, knew nothing of the condition of the state of W'm Fitzgerald, or whether the ex'or was in advance to
84 it or not. Since the transaction above mentioned, this resp'd't has been duly adjudged a bankrupt and discharged from all liabilities against his estate which existed on the 25th of Jan., 1868, and this resp'd't relies on said discharge as a protection to him if he did incur any liability by purchasing the said bonds, but confidently submits to this honorable court that he has not incurred any such liability. And having fully answered he prays to be hence dismissed, with his costs.

Sworn to by G. D. Neal before—

L. SCRUGGS, *D. C.*

May 31st, 1869.

The answer of Richard Jones, filed 1st June, 1869, is in these words:

Answer of Rich'd Jones.

The separate answer of Richard Jones to a bill of complaint exhibited in the circuit court of Pittsylvania by William T. Clark and John W. Holland against this resp'd't and others.

This resp'd't, reserving to himself the benefit of all just exceptions to the said bill, says the same is not sufficient in law to charge this resp'd't; and proceeding to answer said bill, or such parts thereof as he is advised it is material for him to answer, but not waiving his said demurrer, this resp'd't says that but one of the bonds mentioned in the said bill was assigned to this resp'd't by G. D. Neal, and that was for upwards of $2,200. He does not recollect the precise am't. He thinks the bond was executed by Archer B. Womack to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd. He does not recollect what he paid Neal for the bond, but thinks he purchased it at a moderate discount above 6 per cent. He did not know for what consideration Neal had obtained it, or that a greater discount had been made to him than 6 per cent. He did not enquire or think about the consideration Neal had paid for the

bond. He considered the bond good. He knew Edmund Fitzgerald was possessed of a considerable estate, and he did not suspect that he did, or designed to do, anything wrong in assigning off said bond. He knew that Neal, at and about that time, was a trading man, and that he sometimes dealt in paper. He did not know of Neal's having any debt either against William or Edmund Fitzgerald, and he did not know the terms on which Neal obtained paper when he dealt in it; but did not doubt that he made a discount of more than 6 per cent. in most cases. He did not consult Edmund Fitzgerald before he obtained the assignment from Neal to know on what terms the assignment was made. The testator, W'm Fitzgerald, was the nephew of this resp'd't, and so was Edmund. He considered both of them in good circumstances, but had no special knowledge as to whether it was necessary to sell
85 said bond to raise money for the estate of the testator, or whether it would be judicious to sell it at a greater discount than 6 p'r c't. Said ex'or never offered to sell this resp'd't any bond due his testator's estate. This resp'd't has collected the debt assigned to him by Neal upon Womack without objection from any quarter; and having fully answered such allegation of the bill which relates to himself, he prays to be hence dismissed with his costs.

The foregoing answer was sworn to by Richard Jones before me.

L. SCRUGGS, *D. C.*

Pittsy'a circuit court, M'ch 17, 1869.

Exceptions to said answer are in these words:

Exceptions to ans'r of R. Jones.

CLARK & HOLLAND *vs.* LUCK & WIFE, &C. } Exceptions to answer of def't Richard Jones.

The plaintiffs except to the answer filed in this case by de*b*. Jones because it fails to respond to the special interrogations contained in said bill, as follows:

1. To the interrogatory what he paid for the bonds assigned said def't by def't Neal, he answers that he does not recollect what he paid for it, but thinks he purchased it at a moderate discount above 6 p'r cent. Said def't may have had no particular recollection on the subject, and yet may have had means in his possession of acquiring the desired information.

2. To the interrogatory whether he had any reason to suppose Neal purchased said bonds at a greater discount than 6 p'r c't, he answers that he did not enquire or think about the consideration Neal had paid for the bond. Said def't might have had such reason, tho' he may not have made any enquiry or thought about the exact discount at which he purchased them.

3. To the interrogatory whether Neal was not in the regular habit of discounting paper at a greater rate than 6 p'r c't, said def't answers that Neal sometimes dealt in paper, and that he did not doubt that he made a discount of more than 6 p'r c't in some cases. All this is not inconsistent with Jones' knowledge, that he was in the regular habit of it, and does not satisfy the question.

4. To the interrogatory whether he knew or had any reason to suspect

that Neal acquired said bonds, except by discounting them at a rate exceeding 6 pr. ct., def't makes no answer.

5. To the interrogatory, whether def't had considerable knowledge of the estate of decedent, def't makes no answer.

For these reasons pl't's humbly pray that said def't may answer more fully.

J. M. WHITTLE, *F. Pl't's.*

86 And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Friday, the 4th day of June, 1869:

Order of the 4th June, 1869.

On motion of the plaintiffs, by their attorney, a rule is awarded against Elisha Barksdale, j'r, returnable to-morrow, to show cause, if any he can, why he should not be fined and attached for failing to answer the plaintiffs' bill.

The following is a copy of the rule, with the return thereon endorsed:

The Commonwealth of Virginia to the sheriff of Pittsylvania County, greeting:

We command you to summon Elisha Barksdale, j'r, to appear before the judge of the circuit court of Pittsylvania County, at the court-house thereof, on to-morrow, to shew cause, if any he can, why he should not be fined and attached for his contempt in failing to file his answer in the chancery cause pending in court between W'm T. Clark, &c., plaintiffs, and C. B. Luck, &c., defendants. And have then this writ.

Witness, George Payne, clerk of our said circuit court, at the court-house, this 4' day of June, 1869, in the ninety-third of the Commonwealth.

GEORGE PAYNE.

Sheriff's return.

June 5th, 1869. Executed on Elisha Barksdale by delivering a copy of the within notice.

JOHN W. JONES, *D. S.*,
For W'M LEAHY, *Sheriff.*

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Saturday, the 5th day of June, 1871:

Order of 5th June, 1871.

On motion of Elisha Barksdale, j'r, and by leave of the court, he filed his answer to the bill of the plaintiff in this cause, and the rule awarded against said Barksdale in this cause on yesterday is ordered to be discharged.

The answer of Elisha Barksdale, j'r, filed 5' June, 1869, is in these words:

87 *Answer of Elisha Barksdale, j'r.*

The separate answer of Elisha Barksdale, j'r, to the bill of complaint exhibited in the circuit court of Pittsylvania County by William T. Clark and John Holland against this respondent and others.

This respondent, reserving to himself the benefit of all just exceptions to the said bill, says that the same is not sufficient in law to charge

this respondent, and proceeding to answer the said bill, or so much thereof as he is advised it is material for him to answer, but not waiving his said demurrer, answers and says that on the 21st of March, 1859, Edmund Fitzgerald assigned to this respondent Raleigh White's bond for $1,000, payable to Edmund Fitzgerald, ex'or of William Fitzgerald, on the 1st of July, 1859; that the said assignment was made to enable this respondent to collect the said bond. The said Edmund Fitzgerald and Raleigh White were upon unfriendly terms. The said White was a singular man, and preferred the bond to be assigned to this respondent. This respondent agreed to collect the bond for a commission of five per cent., and after deducting commissions and the interest for the time the bond had to run the said Fitzgerald would only have been entitled to $633.34. This respondent compromised with and paid him $940, by check upon C. D. Bennet for $759.00 and his due-bill for $181.00. The said Edmund Fitzgerald was at that time possessed of good estate in good credit, and this respondent had no suspicion that he intended to misapply the assetts of his testator. This respondent did not suppose that he was incurring any liability in collecting the money for the said Fitzgerald and charging him commissions therefor. This respondent was and is at this time a practicing attorney, and supposed that he had a perfect right to collect any debt for the said Edmund Fitzgerald, and pay it over to him. This respondent did not know anything about the state of accounts between the said executor and his testator, and did not inquire, and had no suspicion that said Fitzgerald intended to make any misapplication of the money. The said Raleigh White paid this respondent every cent due on the bond on the 22d of March, 1859, without any deduction save the interest for the time the bond had to run. The bond is herewith filed, having been delivered to this respondent a few days ago by the adm'r of the said Raleigh White. This respondent has never seen it from the time it was paid till a few days since, and had forgotten all about the transaction till he was informed a few days since by the counsel for the plaintiff that he had seen the bond at the late residence of Raleigh White. This respondent made a memorandum on the back of the bond on the day it was assigned to him, which shews the amount paid to the said Edmund Fitzgerald, and how it was paid. This respondent paid to the said Edmund
88 Fitzgerald the amount of the due-bill, $181, short time after it was executed. And having fully answered, prays to be hence dismissed, &c.

E. BARKSDALE, J'R.

Subscribed and sworn to before me this 5th day of June, 1869.
R. W. WATKINS, *D. C.*

The bond referred to in said answer of Elisha Barksdale, j'r, is in these words:

Copy bond.

$1,000. On the 1st day of July, 1859, I, Raleigh White, do promise and oblige myself, my heirs, &c., to pay to Edmund Fitzgerald, j'r, executor of W'm Fitzgerald, j'r, deceased, or assigns, the sum of one thousand dollars, lawful money of Virginia, for value received.

Witness my hand and seal this 19th day of May, 1858.

RALEIGH WHITE, [SEAL.]

Witness:
W'M WIMBISH.

Endorsed: 1859, March 21st. For value received, I assign the within bond to Elisha Barksdale, j'r.

E. FITZGERALD.

Bennett	$759 00
D. bill	181 00
	$940 00

Paid to me in full by D'r Raleigh White.

E. BARKSDALE, J'R.

MARCH 22D, 1859.

Exception to answer of E. Barksdale.

Exceptions to said answer of Elisha Barksdale, j'r, are in these words:

CLARK & HOLLAND *vs.* LUCK AND WIFE, &C. } Exceptions to answer of def't Barksdale.

The plaintiffs except to the answer of def't Barksdale, for the reasons following, viz:

89 1. Because it makes no answer to the allegation that when said def't took his assignment from Edmund Fitzgerald, the ex'or of W'm Fitzgerald, that there was no necessity for sacrificing its assets, they being sufficient to pay the debts of the estate.

The pl't's therefore pray that on the point aforesaid said def't may answer more fully.

J. WHITTLE,
For Pl't'fs.

Answer of Jno. E. Kennedy, adm'r R. White.

The answer of John E. Kennedy, filed 5th June, 1869, is in these words:

The separate answer of John E. Kennedy, adm'r, with the will annexed, of Raleigh White, dec'd, to a bill of complaint exhibited in the circuit court of Pittsylvania by William T. Clark and Jno. W. Holland, against this respondent and others:

This respondent, reserving to himself the benefit of all just exceptions to the said bill, says that the same is not sufficient in law to charge this respondant; and proceeding to said bill, or so much thereof as he is advised it is material for him to answer, but not waiving his said demurrer, this respondant says that he admits that Raleigh White did, in his life-time, purchase a portion of the land in the bill mentioned, and that the purchase-money amounted to the sum of $3,982.50. But this respondent also charges that in a short time after the purchase of the land aforesaid a settlement was made with the said Edmund Fitzgerald, in which about $2,000 of the purchase-money was paid; that a second payment was made by the said White of the sum of $1,000.00 at the time the bond for which it was executed fell due, to wit, about the 1st day of July, 1859, to Elisha Barksdale, j'r, to whom it had been assigned by Edmund Fitzgerald. That, in regard to the other bond of $1,000.00 executed to the said Edmund Fitzgerald for the balance of the purchase-money for said land, this respondants fully believes, was

paid at the time said bond fell due, to wit, the 1st of July, 1860. This respondant recollects to have seen a receipt signed by the said Edmund Fitzgerald, to Raleigh White, for the first payment mentioned above, about $2,000.00, but which has been, by accident, lost or mislaid. This amount of the bond, due 1st of July, 1859, and stated to have been paid to Elisha Barksdale, j'r, is evidenced by the bond itself, receipted in full by said Barksdale, and which can be produced if necessary. The bond due in 1860, this respondant believes, was satisfied by the said White in his life-time; for this, among other reasons, that he has never, since the death of the said , been applied to by the said Edmund Fitzgerald, or any one else, for the amount of said bond, or for any part of the purchase-money of said land. This respondant further asserts that, from a statement in the handwriting of William Wimbish, a merchant living near the said White, who was accustomed to
90 transact business for said White, who was old and infirm, also from the condition of the business matters and affairs of said White at the time of his death, and from the further fact that a deed was made to the said White of the land aforesaid, he has a right to infer and claim and does claim that every cent of said purchase-money was paid by the said White in his life-time. This respondant asserts and believes that the reason of the assignment of the bond due 1st of July, 1859, to E. Barksdale, j'r, arose from the fact that Raleigh White did not speak or have anything to do with Edmund Fitzgerald, and he therefore preferred that this bond, which had been placed in the hands of said Barksdale for collection, should be assigned to said Barksdale and the settlement made with him.

And this respondant, having fully answered, prays to be hence dismissed, &c.

JOHN E. KENNEDY.

Sworn to by Jno. E. Kennedy in open court.

L. SCRUGGS, *D. C.*

JUNE 3, 1869.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Saturday, the 6th day of Nov'r, 1869:

Order of the 6th of Nov'r, 1869.

For reasons appearing to the court, it is ordered that this cause be continued till the next term.

And at another day, to wit, at a circuit court held for the county of Pittsylvania, at the court-house thereof, on Saturday, the 28th day of May, 1870:

Order of the 28th May, 1870.

On motion of the plaintiffs, by counsel, John L. Hurt is appointed guardian ad litem of the infant defendant, Martha W. Fitzgerald, and on motion of said guardian ad litem, and L. Scruggs and M. T. Smith, ex'ors of Richard Jones, dec'd, by counsel, and by leave of the court, they filed their separate answer in this cause; to which the plaintiffs replied generally.

The answer of John L. Hurt, guardian ad litem of Martha W. Fitzgerald, filed 28th May, 1870, is in these words:

Answer of John L. Hurt, guard'n ad litem.

The answer of Martha W. Fitzgerald, an infant, by her guard-
91 ian ad litem, John L. Hurt, to a bill exhibited against herself and others in the circuit court of Pittsylvania County, by W'm T. Clark and John W. Holland in the circuit court of Pittsylvania County.

This respondent, being an infant, submits herself to the protection of the court. And having answered, &c.

JOHN L. HURT.

The answer of L. Scruggs and M. T. Smith, ex'ors of Richard Jones, filed 28th May, 1870, is in these words:

Answer of L. Scruggs and M. T. Smith, ex'ors of R. Jones, deceased.

The joint answer of Langhorne Scruggs and Mansel T. Smith, executors of Richard Jones, deceased, to a bill exhibited against their testator, &c., by William T. Clark and John W. Holland, and revived against them:

These respondents say that the bill of the plaintiffs is not sufficient in law. And not waiving, but insisting on their demurrer, for ans. to the material allegations of the bill they say they rely on the answer of their testator, with the exception of a statement made through lapse of memory by him that only one of the bonds was assigned to him by G. D. Neal; it appears that both of said bonds were assigned.

These respondents state that they are both closely connected with their testator, each of them having married a granddaughter of his, and both having aided him in his business for several years, and one of them (Smith) having lived in his house for some years before his death, and both of them having had many confidential conversations with him about his affairs and about the bonds referred to in the bill, and they do not believe that their testator had any information tending to shew that Edmund Fitzgerald intended to commit any fraud against the estate of his testator. It comes within the knowledge of these respondents that, though he was an uncle of said Edmund, that they were not on intimate terms, and that they had no dealings with each other, and lived a considerable distance apart from each other.

These respondents do not deny the commencement of the suit referred to in the bill, nor the insolvency of the bail taken by the sheriff when the ex'or was about to leave the State; and they are advised that, if the allegations of the bill are true, that the parties interested ought to have proceeded against the sheriff and his securities for a breach of the duty of the sh'ff.

These respondents, further answering, say they have been
92 informed, believe, and therefore charge that at the time when the said bonds were assigned to Neal the said Edmund Fitzgerald was considerably in advance of the estate of his testator, and that said estate was owing him about $, as will fully appear by reference to an extract from an account-current herewith filed marked X, and made a part of this answer; and they do not admit that the money received from Neal was wasted by said ex'or and not applied either to re-imburse

himself for his said advances or to pay pressing demands against the estate, and they call for proofs of these facts.

These respondents do not admit, but on the contrary feel justified from the reasons already stated in denying, to the best of their knowledge and belief, that their testator had any knowledge whatever of the state of the assets of the estate of W'm Fitzgerald at the time when said bonds were sold by his ex'or, and they do not believe that their testator had any knowledge of the discount at which Neal bought said bonds, but they are confident that he had not any information on the subject.

These respondents are advised that even if the said Edmund Fitzgerald had committed a devastavit (which they do not admit) in selling said bonds to Neal, and then Neal sold the bonds to their testator, that would give the pl'ffs no right of action against their testator, though Neal may have had notice of all the facts, and may have laid himself liable to them. As soon as said bonds were assigned by the ex'r to Neal, the devastavit (if any) was committed and complete; the money was paid by Neal to the ex'r, and no subsequent sale by Neal, at whatever discount, could have inflicted any further loss on the estate. The bonds, on the sale to Neal, ceased to be assets of the estate of Fitzgerald, and had gone upon the market like any personal property, and the testator of these respondents stood just as any other remote assignee or vendee would stand. A purchaser without notice from a purchaser with notice acquires a good title. These respondents believe and charge that in fact their testator purchased said bonds at a very small discount, as stated in his answer. They will endeavor to ascertain and file an exact statement. They believe that he knew the fact that Neal was in the habit of buying paper. That he had no knowledge or notice and no reason to believe that Edmund Fitzgerald intended to commit a fraud on the estate of his testator, or to waste the assets of the estate, and, indeed, that he had no information on the subject, and just purchased these bonds as he would have purchased any other bonds offered to him which he thought good. These respondents deny that they or either of them had any knowledge of any of the matters contained in the bill, and deny that their testator had any notice of or any reason to believe that the said Edmund Fitzgerald intended to do anything wrong in the sale of the bonds aforesaid; and having fully answered, they pray to be hence dismissed with their costs, &c.

93 PITTSYLVANIA COUNTY, *to wit:*

This day Langhorne Scruggs personally appeared before me and made oath to the truth of the facts set forth in the foregoing answer, to the best of their knowledge and belief.

Given under my hand this 28 day of May, 1870.

JNO. L. HURT, *Clk.*

Exhibit X not fi'ed.

Exhibit X, referred to in said answer, is not filed.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 1st day of June, 1871:

Order of 1st June, 1871.

For reasons appearing to the court, it is ordered that this cause be continued till the next term.

And at another day, to wit, at a special term of the circuit court, continued and held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 13 day of July, 1870:

Order of 13th July, 1870.

On motion of the plaintiffs, by counsel, they have leave to withdraw their replication to the answer of Richard Jones' ex'ors.

And at another day, to wit, at a special term of the circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 14th July, 1870:

Order of 14th July, 1870.

For reasons appearing to the court, it is ordered that the order made in this cause on yesterday be stricken out, because the cause was disposed of at the May term, 1870, and the court at this special term has no right to make any order.

And at another day, to wit, at a circuit court held for the county of Pittsylvania, at the court-house thereof, on Friday, the 28 day of October, 1870:

Order of 28 Octo., 1870.

94 On motion of the defendants, C. D. Bennett, adm'r of William Fitzgerald, dec'd, and Martha W. Fitzgerald, by counsel, and by leave of the court, they filed their separate answers in this cause. The answer of C. D. Bennett, adm'r of W'm Fitzgerald, j'r, dec'd, filed 28 October, 1870, is in these words:

Answer of C. D. Bennett.

The answer of Coalman D. Bennett, late sheriff of Pittsylvania County, to whom was committed for administration the unadministered effects of William Fitzgerald, dec'd, by the ex'or of said decedent, Edmund Fitzgerald, with the will of said decedent annexed, to a bill exhibited against himself and others, by William T. Clark and John W. Holland, in the circuit court of Pittsylvania County.

This respondent answering says that the death of said decedent, the probate of his last will and testament, the qualification and removal from office of his ex'or, and the appointment of this respondent, being sheriff as aforesaid, to administer the unadministered effects of the testator, with his will annexed, are admitted. That Caddis B. Luck intermarried with the widow of the testator, and that the suit, mentioned in plaintiff's bill as having been instituted by said Luck and wife, was instituted and is still pending in this honorable court. He admits the taking of the accounts mentioned in the said bill, but has no personal knowledge of said account or the correctness of it. This respondent has no personal knowledge of the sale and transfer of the bonds mentioned in the bill to his codefendants, Elisha Barksdale, j'r, and Richard Jones, or to Raleigh White, dec'd, or the circumstances under which said bonds were purchased or transferred. He does not think that the situation of his testator's estate at the time of said trans-

fer rendered necessary a sacrifice of any part of its assets. This respondent is informed and believes that there are now debts due by his testator's estate rendering it necessary that anything which may be recovered as due said estate should come to his hands for administration before the same shall be passed to the legatees and devisees under the said will. He has no assets in hand belonging to the testator's estate, and had none when the plaintiffs commenced their said suit, and admits that before the same was instituted the plaintiffs, by their counsel, applied to him to institute this suit for the purposes set forth in their bill, which he declined to do, having no assets in hand to defray the cost thereof, but consented that the plaintiffs might institute the same in their own names. But should they recover, this resp't claims the right to receive and disburse the assets recovered, as the law directs. He admits the death of Raleigh White and the probate of his last will and testament, and the qualification of John Canada as adm'r, with said will annexed, and has no objection to this honorable court proceeding to the trial of said suit and rendering such decree therein as to it may seem meet. And having answered, &c.

COALMAN D. BENNETT.

95 And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Thursday, the 3d day of November, 1870:

Order of 3 *Nov'r*, 1870.

The pl't', by counsel, moved the court for leave to withdraw his joinder in the demur's entered by def'ts Barksdale and Jones and by the def'ts Scruggs and Smith, ex'ors of said Jones; which was allowed. And on further motion of pl't', by counsel, it was moved to reject said demurrer' on the ground that they were informal and insufficient; which motion was sustained and said demurrers rejected, the court giving leave at the same time said parties to file more formal demurrers; which said parties declined to dc.

And at another day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Monday, the 7th day of November, 1870:

Order of 7 *November*, 1870.

This cause, after having been argued by counsel, upon the application of the counsel for the defendants, this cause is continued for reargument.

And now, at this day, to wit, at a circuit court continued and held for the county of Pittsylvania, at the court-house thereof, on Wednesday, the 7th day of June, 1871, being the same day and year first herein mentioned:

Final order of 7 *June*, 1871.

It appearing to the c't that the def't, Edm'd Fitzgerald, formerly ex'or of the last will and testament of W'm Fitzgerald, dec'd, is a non-resident of this State, that the order of publication awarded as to him has been duly published and posted, and he failing to appear and answer, on motion of the pl't'ffs, by counsel, the pl't'ffs' bill is taken for confessed as

to that def't. It moreover appearing to the court that the def't, Coalman D. Bennett, late sheriff of Pittsylvania County, and as such adm'r de bonis non, with the will annexed, of W'm Fitzgerald, dec'd, is dead, and that no further adm'on has been taken on the estate of the said W'm Fitzgerald. It further appearing to the court that the proceedings at rules whereby the amended bill of the pl't'ffs filed vs. the def'ts, John W. McKinsey and Geo. C. Brown, as assignees in b'kruptcy of def't, Griffith D. Neal, has been taken for confessed, are regular, the court doth confirm the same. And it appearing to the c't that
96 the proceedings at rules whereby the pl't'ff's bills were taken for confessed against the def'ts, Caddis B. Luck and Martha V., his wife, were regular, the court doth confirm the same. And now this cause, which was argued at the last term of this court, and continued until this term for further argument, came on to be heard on the original and amended bills of the plaintiffs, the answer of the def't, Coalman D. Bennett, late sh'ff of Pittsylvania Co., and as such administrator de bonis non, with the will annexed, of W'm Fitzgerald, dec'd, the answer of Richard Jones, dec'd, and of his ex't'rs, L. Scruggs and Mansel T. Smith, of Griffith D. Neal, Elisha Barksdale, j'r, John E. Kennedy, adm'r, with the will annexed, of Raleigh White, dec'd, and of Martha W. Fitzgerald, an infant, by J. L. Hunt, her g'd'n ad litem, assigned by the court, the replication to the said answers, the exhibits referred to in the pl't'ffs' bill and in the answers of the def'ts, and was argued by counsel. On consideration whereof, the court doth adjudge, order, and decree that the pl't'ffs' bills be dismissed as to the def'ts Barksdale and Kennedy, and that the said def'ts recover from the pl't'ffs their costs in this behalf expended. And the court being of opinion that the bonds of $1,000, executed by Archer B. Womack and James M. Adams to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, on Dec. 1st, 1857, payable on or before the 18th day of Nov., 1859, with int. from 18th Nov'r, 1858, assigned by the said ex'r to the said Griffith D. Neal on the 15th day of June, 1859, and by him to the aforesaid Richard Jones on the 2d day of July, 1859, and of $2,293, executed by the said Womack and Adams to the said ex'or on the 1st day of Dec'r, 1857, payable on or before the 18th day of Nov'r, 1860, with int. from Nov. 18, 1858, and assigned to the def't Neal on the 15th day of June, 1859, and by said Neal to the aforesaid Richard Jones, dec'd, on the 21st day of June, 1859, were each illegally transferred by the said Edmund Fitzgerald, ex'r as aforesaid, to the def't, G. D. Neal, by which transfer a devastavit of said assets was committed by the said ex'r, in which the said Neal illegally participated; that said transfers by said Neal of the said bonds to the said Richard Jones in his life-time was also illegal, in consequence of the knowledge of the said Jones at the time of the transfers to him of the illegal transfers thereof to the said Neal by the said Edmund Fitzgerald, ex'r, doth adjudge, order, and decree that the several transfers of the said bonds were and are null and void. And the court being further of opinion that said Edmund Fitzgerald and Griffith D. Neal, and the said Scruggs and Smith, as ex't'rs of the said Jones, out of the assets of their said testator, are liable to pay the money and interest on said bonds to those entitled thereto; and it appearing from the decree in the aforesaid suit of said Luck and wife vs. the said Edmund Fitzgerald, ex'r as aforesaid, and others, the record in which suit is exhibited by the pl't'ffs as one of his exhibits, that the money due on the said bonds constitutes a
97 part of the sum of money decreed to the said Luck and wife and to the said Martha W. Fitzgerald vs. the pl't'ffs, Clark and Holland, and that the said Clark and Holland have a right to have

the said money appropriated to the payment of the money decreed to be paid by them in the said suit of Luck and wife vs. the said Clark and Holland at the Oct. term, 1870, of this court, by distributing the aggregate of the said bonds, to wit: the sum of $3,293, with int. thereon as before stated, between the said Caddis B. Luck and wife and said Martha W. Fitzgerald, according to the principal of distribution adopted in said suit; and it appearing that $874, with int. thereon from Nov. 18, 1858, is the share of said Luck and wife, and $2,419, with similar interest, is the share of the said Martha W. Fitzgerald, the c't doth adjudge, order, and decree that the def'ts Edmund Fitzgerald and Griffith D. Neal, out of their own estate, and said Scruggs and Smith, as ex't'rs of the said Richard Jones, dec'd, out of the assets of the testator in their hands to be administered, do pay to the said Luck and wife the aforesaid sum of $874, with int. at 6 per c. from Nov. 18, 1858, and to the said Martha W. Fitzgerald the aforesaid sum of $2,419, with like interest; and that the said def'ts Fitzgerald and Neal, out of their estate, and Smith and Scruggs, as ex't'rs, out of the assets of their testator, pay the costs of this suit; any sum or sums of money which has been or may be paid to the said Luck and wife and Martha W. Fitzgerald, by the def'ts Fitzgerald, Neal, or the ex't'rs of the said Jones, is to be credited to the said Clark and Holland on the decree which the said Luck and wife and Martha W. Fitzgerald obtained, as aforesaid, vs. the said Clark and Holland; and the said Luck and wife and Martha W. Fitzgerald may sue out any proper execution to enforce the collection of the said two sums of money, crediting whatever may be made under such execution or whatever paid to them on account thereof on the aforesaid decree of Oct. term, 1870, vs. said Clark and Holland; and should the said Clark and Holland pay to the said Luck and wife and Martha W. Fitzgerald a sum of money under the aforesaid decree of Oct., 1870, to the am't of $3,293, with int. thereon from Nov. 18, 1858, liberty is hereby reserved to the said Clark and Holland to apply to this court for execution vs. the said Edmund Fitzgerald, Griffith D. Neal, and the said ex't'rs of said Jones for such sum of money, not exceeding the aforesaid sum of $3,293, with int. thereon as aforesaid. And it appearing to the court that all the debts due from the estate of the testator, W'm Fitzgerald, dec'd, have been provided for, and that all the debts due to the said estate have been collected, except those mentioned in this decree and the decree of Oct., 1870, as fully appears from the record in the suit of Luck and wife vs. Edmund Fitzgerald et als., this court does not deem it proper to delay this cause for the appointment of a personal representative of the said W'm Fitzgerald, dec'd, and for making him a party to this suit.

The def'ts, the ex't'rs of Richard Jones, dec'd, desiring to present
95 a petition for an appeal, the court doth suspend the execution of this judg't for ninety days as to the said def'ts, the ex't'rs of Richard Jones, dec'd.

The following are copies of depositions taken and filed by the plaintiffs in this cause:

Deposition of G. D. Neal.

The deposition of G. D. Neal, taken 4th March, 1870:

State whether or not you ever purchased any bond or bonds from Edmund Fitzgerald as ex'or of William Fitzgerald, dec'd; if so, when did you purchase them.

Answer. I did; I think I purchased them in the month of June, 1859; about the 15th of June.

to that def't. It moreover appearing to the court that the def't, Coalman D. Bennett, late sheriff of Pittsylvania County, and as such adm'r de bonis non, with the will annexed, of W'm Fitzgerald, dec'd, is dead, and that no further adm'on has been taken on the estate of the said W'm Fitzgerald. It further appearing to the court that the proceedings at rules whereby the amended bill of the pl't'ffs filed vs. the def'ts, John W. McKinsey and Geo. C. Brown, as assignees in b'kruptcy of def't, Griffith D. Neal, has been taken for confessed, are regular, the court doth confirm the same. And it appearing to the c't that
96 the proceedings at rules whereby the pl't'ff's bills were taken for confessed against the def'ts, Caddis B. Luck and Martha V., his wife, were regular, the court doth confirm the same. And now this cause, which was argued at the last term of this court, and continued until this term for further argument, came on to be heard on the original and amended bills of the plaintiffs, the answer of the def't, Coalman D. Bennett, late sh'ff of Pittsylvania Co., and as such administrator de bonis non, with the will annexed, of W'm Fitzgerald, dec'd, the answer of Richard Jones, dec'd, and of his ex't'rs, L. Scruggs and Mansel T. Smith, of Griffith D. Neal, Elisha Barksdale, j'r, John E. Kennedy, adm'r, with the will annexed, of Raleigh White, dec'd, and of Martha W Fitzgerald, an infant, by J. L. Hunt, her g'd'n ad litem, assigned by the court, the replication to the said answers, the exhibits referred to in the pl't'ffs' bill and in the answers of the def'ts, and was argued by counsel. On consideration whereof, the court doth adjudge, order, and decree that the pl't'ffs' bills be dismissed as to the def'ts Barksdale and Kennedy, and that the said def'ts recover from the pl't'ffs their costs in this behalf expended. And the court being of opinion that the bonds of $1,000, executed by Archer B. Womack and James M. Adams to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, on Dec. 1st, 1857, payable on or before the 18th day of Nov., 1859, with int. from 18th Nov'r, 1858, assigned by the said ex'r to the said Griffith D. Neal on the 15th day of June, 1859, and by him to the aforesaid Richard Jones on the 2d day of July, 1859, and of $2,293, executed by the said Womack and Adams to the said ex'or on the 1st day of Dec'r, 1857, payable on or before the 18th day of Nov'r, 1860, with int. from Nov. 18, 1858, and assigned to the def't Neal on the 15th day of June, 1859, and by said Neal to the aforesaid Richard Jones, dec'd, on the 21st day of June, 1859, were each illegally transferred by the said Edmund Fitzgerald, ex'r as aforesaid, to the def't, G. D. Neal, by which transfer a devastavit of said assets was committed by the said ex'r, in which the said Neal illegally participated; that said transfers by said Neal of the said bonds to the said Richard Jones in his life-time was also illegal, in consequence of the knowledge of the said Jones at the time of the transfers to him of the illegal transfers thereof to the said Neal by the said Edmund Fitzgerald, ex'r, doth adjudge, order, and decree that the several transfers of the said bonds were and are null and void. And the court being further of opinion that said Edmund Fitzgerald and Griffith D. Neal, and the said Scruggs and Smith, as ex't'rs of the said Jones, out of the assets of their said testator, are liable to pay the money and interest on said bonds to those entitled thereto; and it appearing from the decree in the aforesaid suit of said Luck and wife vs. the said Edmund Fitzgerald, ex'r as aforesaid, and others, the record in which suit is exhibited by the pl't'ffs as one of his exhibits, that the money due on the said bonds constitutes a part of the sum of money decreed to the said Luck and wife
97 and to the said Martha W. Fitzgerald vs. the pl't'ffs, Clark and Holland, and that the said Clark and Holland have a right to have

the said money appropriated to the payment of the money decreed to be paid by them in the said suit of Luck and wife vs. the said Clark and Holland at the Oct. term, 1870, of this court, by distributing the aggregate of the said bonds, to wit: the sum of $3,293, with int. thereon as before stated, between the said Caddis B. Luck and wife and said Martha W. Fitzgerald, according to the principal of distribution adopted in said suit; and it appearing that $874, with int. thereon from Nov. 18, 1858, is the share of said Luck and wife, and $2,419, with similar interest, is the share of the said Martha W. Fitzgerald, the c't doth adjudge, order, and decree that the def'ts Edmund Fitzgerald and Griffith D. Neal, out of their own estate, and said Scruggs and Smith, as ex't'rs of the said Richard Jones, dec'd, out of the assets of the testator in their hands to be administered, do pay to the said Luck and wife the aforesaid sum of $874, with int. at 6 per c. from Nov. 18, 1858, and to the said Martha W. Fitzgerald the aforesaid sum of $2,419, with like interest; and that the said def'ts Fitzgerald and Neal, out of their estate, and Smith and Scruggs, as ex't'rs, out of the assets of their testator, pay the costs of this suit; any sum or sums of money which has been or may be paid to the said Luck and wife and Martha W. Fitzgerald, by the def'ts Fitzgerald, Neal, or the ex't'rs of the said Jones, is to be credited to the said Clark and Holland on the decree which the said Luck and wife and Martha W. Fitzgerald obtained, as aforesaid, vs. the said Clark and Holland; and the said Luck and wife and Martha W. Fitzgerald may sue out any proper execution to enforce the collection of the said two sums of money, crediting whatever may be made under such execution or whatever paid to them on account thereof on the aforesaid decree of Oct. term, 1870, vs. said Clark and Holland; and should the said Clark and Holland pay to the said Luck and wife and Martha W. Fitzgerald a sum of money under the aforesaid decree of Oct., 1870, to the am't of $3,293, with int. thereon from Nov. 18, 1858, liberty is hereby reserved to the said Clark and Holland to apply to this court for execution vs. the said Edmund Fitzgerald, Griffith D. Neal, and the said ex't'rs of said Jones for such sum of money, not exceeding the aforesaid sum of $3,293, with int. thereon as aforesaid. And it appearing to the court that all the debts due from the estate of the testator, W'm Fitzgerald, dec'd, have been provided for, and that all the debts due to the said estate have been collected, except those mentioned in this decree and the decree of Oct., 1870, as fully appears from the record in the suit of Luck and wife vs. Edmund Fitzgerald et als., this court does not deem it proper to delay this cause for the appointment of a personal representative of the said W'm Fitzgerald, dec'd, and for making him a party to this suit.

The def'ts, the ex't'rs of Richard Jones, dec'd, desiring to present
90 a petition for an appeal, the court doth suspend the execution of this judg't for ninety days as to the said def'ts, the ex't'rs of Richard Jones, dec'd.

The following are copies of depositions taken and filed by the plaintiffs in this cause:

Deposition of G. D. Neal.

The deposition of G. D. Neal, taken 4th March, 1870:

State whether or not you ever purchased any bond or bonds from Edmund Fitzgerald as ex'or of William Fitzgerald, dec'd; if so, when did you purchase them.

Answer. I did; I think I purchased them in the month of June, 1859; about the 15th of June.

By same. To whom were said bonds executed?

Ans. They were executed to Edmund Fitzgerald, ex'or of W'm Fitzgerald.

By same. State the amount of said bonds, and when they became due.

Ans. One was for the am't of $1,000, executed by A. W. Womack and James M. Adams, dated 1 Dec'r, 1857, payable on or before 18 November, 1859, with interest from 18 November, 1858. The other was for $2,293, due, as appears from an entry upon my books, the 18 November, 1860.

By same. Was there or not any other obligor in the last-named bond?

Ans. I do not recollect; my impression is that there was another obligor.

By same. Have you or not any doubt of the correctness of said entry?

Ans. I have none.

By same. State what you may remember of the amount of said bonds and dates apart from said entry.

Ans. I do not recollect the dates or amounts of the said bonds from any other source than from the entry upon my books. I was under the impression, however, before examining my books, that there was but one bond, and that it was for the sum of about $3,000, but when I did examine I found there were two.

By same. State what your present recollection is of the amount of said bonds.

Ans. My impression would be, if I had not examined my books, that there was but one bond, and that was for about three thousand dollars, or upwards, but on examining my books I find there were two bonds, both together amounting to upwards of $3,000.

By same. What did you pay said Edmund Fitzgerald for said bonds?

Ans. I paid him for the two bonds, amounting in the aggregate to $3,293, exclusive of interest, the sum of $2,780, the said Fitzgerald making a discount of $513.

99 By same. State whether or not any person was directly or indirectly interested with you in said purchase.

Ans. No person was so interested with me.

By same. What disposition did you make of said bonds?

Ans. I traded them to the def't, Richard Jones.

By same. State the terms on which you traded them.

Ans. I received for the first bond of $2,293.00 the sum of $2,076.00, and for the second bond of $1,000 I received the sum of $980.00.

By same. State whether or not any person was directly or indirectly interested with you in said sale.

Ans. No person was so interested with me.

By same. State whether or not, at the time of purchasing and selling said bonds, you were in the regular and known habit of shaving paper.

Ans. I was.

By same. State whether or not said Jones was at said time in the same habit.

Ans. I believe he was.

By same. What relationship, if any, existed between said Jones and said Edmund and William Fitzgerald?

Ans. Richard Jones was reputed to be the uncle of said W'm Fitzgerald and Edmund Fitzgerald.

By same. State whether or not, at the time you bought and sold said bonds, the estate of said William Fitzgerald was good for its debts, and having a large surplus after paying them.

Ans. I know nothing about the condition of the estate at the time of the purchase. I have since settled an account, and find that the estate was perfectly solvent at that time, and had a surplus after paying the debts due by the same.

By same. State whether or not, at the time you purchased said bonds, you made any enquiry respecting the condition of said estate.

Ans. I did not.

By same. At the time when said Jones purchased said bonds from you, did he make any enquiry of you as to the terms on which you had purchased said bonds, or of the condition of the estate when you bought them or when you sold them to him?

Ans. He did not.

By same. State whether or not you ever before sold paper to said Jones at a heavier discount than 6 per cent.

Ans. I have sold paper to him at a heavier discount than 6 per cent. since the above-mentioned transaction. I do not remember ever having done so prior thereto, though I may have done so.

By same. State whether or not, at the time of selling said bonds to said Jones, it was generally known in the community that you were in the habit of shaving paper.

Ans. I was in the habit of shaving paper at that time, and believe it was generally known.

100 By same. State whether or not the bond for $2,293, filed in the papers of Fitzgerald, for, &c., (in the county court of Pittsylvania County,) vs. Archer B. Womack and James M. Adams, jud. rendered March 21, 1861, and the bond of $1,000, filed in the papers of G. D. Neal, who sues for Richard Jones vs. Archer B. Womack in same court, and in which judgment was rendered April 16, 1860, are the same bonds as those mentioned as purchased by you from said Ed. Fitzgerald, ex'or.

Ans. The bond assigned by me on the 25th June, 1859, to Richard Jones, amounting to $2,293.00, and filed in the papers of Fitzgerald, for, &c., against A. B. Womack, in which judgment was rendered 21 March, 1861, is the identical bond traded to Mr. Jones by me, and the $1,000 upon which judgment was confessed the 16th April, 1860, is the identical bond referred to in the question.

By same. State whether Raleigh White, deceased, was good for all his debts on the 21st day of March, 1859, and always thereafter.

Ans'r. I think the general impression was that Raleigh White was perfectly good for his debts on the 21st March, 1859. I do not know that I can say that his estate was good since the war. He was reported to be solvent, and I so regarded him, up to the war.

G. D. NEAL.

Deposition of G. D. Neal.

The deposition of G. D. Neal, taken 28th May, 1870:

Ques. by pl'tffs' atty. State whether or not you ever purchased any bond or bonds from Edmund Fitzgerald as ex'r of W'm Fitzgerald, dec'd; if so, when you purchased them.

Ans'r. I did; I think I purchased them in the month of June, 1859, about the 15th.

By same. To whom were said bonds executed?

Ans. They were executed to Edmund Fitzgerald, ex'or of W'm Fitzgerald.

By same. State the amount of said bonds and when they became due.

Ans. One was for the amount of one thousand dollars, ($1,000,) executed by A. W. Womack and James M. Adams, dated the 1st of Dec., 1857, payable on or before the 18th day of Nov'r, 1859, with interest from the 18th day of November, 1858. The other was for twenty-two hundred and ninety-three dollars, ($2,293,) due, as appears from entry on my books, the 18th Nov'r, 1869.

By same. Have you or not any doubt of the correctness of said entry?

Answer. I have no doubt as to the correctness of said entry.

101 Quest. by same. Was there or not any other obligor in said bond of $2,293?

Ans. I do not recollect; my impression is that there was another obligor. I am very confident that there was one.

By same. State what you may remember of the amount and dates of said bonds, apart from said entry.

Ans. I do not recollect the amounts and dates of said bonds from any other source than from the entry on my books. I was under the impression, however, before examining my books that there was but one bond, and that it was for the sum of about three thousand dollars ($3,000.) When I did examine I found there were two.

By same. State what your present recollection is of the amount of said bonds.

Ans. My impression would be if I had not examined my books that there was but one bond, and that was for about three thousand dollars or upwards, but on examining my book I found that there were two bonds, the aggregate amount of which was upwards of three thousand dollars.

By same. What did you pay said Edmund Fitzgerald for said bonds?

Ans. I paid him for the two bonds, amounting in the aggregate to thirty-two hundred and ninety-three dollars, the sum of twenty-seven hundred and eighty dollars; the said Fitzgerald discounted five hundred and thirteen dollars on the principal of said bonds.

By same. What disposition did you make of said bonds?

Ans. I traded them to the def't, Richard Jones.

By same. State on what terms you traded them.

Ans. I received for the bond of $2,293 $2,076, and for the bond of $1,000 I received the sum of $980.

By same. State whether or not at the time of purchasing and selling said bonds you were in the regular and known habit of shaving paper.

Ans. I was.

By same. State whether or not said Jones was in the same habit.

Ans. I believe he was.

By same. State the relationship, if any, then existing between said Jones and said W'm and Edmund Fitzgerald.

Ans. Ric'd Jones was reputed to be the uncle of both the said W'm and Edmund Fitzgerald.

By same. State whether or not at the time you bought and sold said bonds the estate of said William Fitzgerald was good for its debts and had a large surplus after paying them.

Ans. I knew nothing about the condition of his estate at the time I purchased said bonds. I have since settled an account, and find that his estate was perfectly solvent at that time.

By same. State at the time aforesaid whether or not said estate was reputed good for all its debts.

102 Ans. I did not know anything about it at that time.

By same. State whether or not at the time you purchased said bonds you made any inquiry respecting the condition of said estate.

Ans. I did not.

By same. At the time when said Jones purchased said bonds from you did he make any enquiry of you as to the terms on which you had purchased them or of the condition of the estate when you bought or sold them?

Ans'r. He did not.

By same. State whether or not at the time of selling said bonds to said Jones it was generally known in the community that you were in the habit of shaving paper?

Answer. I believe it was generally known.

By same. State whether or not the bond of $2,293, filed in the papers of Fitzgerald, for, &c., in the county court of Pitts'a C'ty vs. Archer B. Womack and Ja's M. Adams, jud. rendered March 21, 1861, and the bond of $1,000, filed in the papers of G. D. Neal, who sues for Richard Jones vs. Archer B. Womack, in same court, and on which judgment was rendered Ap'l 16, 1860, are the same bonds as those mentioned as purchased by you from said Fitzgerald's ex'or.

Ans'r. They are the same bonds.

By same. State whether or not Raleigh White, dec'd, was good for all his debts on 21st March, 1859, and always afterwards.

Ans'r. He was regarded as good for his debts up to the 21st of March, 1859. I regarded him as good up to the commencement of the war. I do not know what is the condition of his estate since the commencement of the war.

Cross-examined by def'ts' counsel:

Please state what reason, if any, you know why the said ex'or, Edmund Fitzgerald, traded the said bonds to you.

Answer. I know of no reason except that he stated to me that he was in advance to the estate and wanted to raise money.

By same. Had you any reason to doubt said statement?

Answer. I had not.

By same. Did you know at that time, or have you since ascertained that that statement so far it related to the indebtedness of said estate to him was in fact true?

Answer. I did not know at that time anything except what Fitzgerald stated to me. I have since settled an account in the suit of C. D. Luck and wife against William Fitzgerald's executor and others, pending in the circuit court of Pittsylvania County, in which there is a balance due the executor of about thirteen or fourteen hundred dollars; I don't recollect the precise amount. Upon the first balance struck in said
103 account, I think in the 'arly part of 1860. I cannot state positively the amount or the date; the papers in the case will show.

By same. State, if you know, what was the general opinion as to the solvency of said Edmund Fitzgerald at the time said bonds were assigned to you.

Answer. He was regarded as perfectly solvent at the time the bonds were traded to me.

By same. Was he not regarded as a man fully responsible for all his pecuniary transactions, and as a man of large means?

Answer. He was so regarded at that time.

By same. How long did he continue to be so regarded?

Answer. I heard nothing to the contrary until he left this State, and the suit of Luck and wife was brought against him.

By same. Had you any reason to believe, at the time of said assignment of said bonds to you, or at the time you traded them to said Jones, that said ex'or was committing or intended to commit any wrong upon said estate?

Answer. I have none.

By same. You have said in a previous answer that said Jones made no enquiries of *of* you respecting said assignment of said bonds to you; state whether, as far as you know, said Jones knew anything whatsoever of the terms of said assignment, except the simple fact of the assignment itself.

Answer. He made no enquiries, and, so far as known, he knew nothing of the transaction between Fitzgerald and myself in regard to said bonds.

By same. When shaving paper, was it your habit to state any person to whom you might assign it what you gave for it?

Answer. It was not.

By same. When did you assign the said bonds to said Jones?

Answer. The assignment was made by *M'r* me to M'r Jones shortly after I traded for the bonds. My recollection is that the assignment was made to Jones of the smaller bond 2d July, 1859, and the other on the 21st of June, 1859. The trade was made for both bonds at the same time, but all money was not paid until the assignment of said bond.

By same. State whether the discount at which M'r Jones purchased said bonds was large, considering the fact that the bonds did not fall due for some months and the terms upon which good paper sold for at that time.

Answer. I think the discount was low.

By same. Do you know on what terms M'r Jones and said Edmund Fitzgerald were during the year 1859?

Ans'r. I do not.

By pl't's. At what place did you trade for and sell said bonds?

Ans'r. At Pittsylvania C't Ho., V'a.

By same. Did said Fitzgerald or not state to you that he was
104 in advance to said estate in reply to a question of yours or of his own accord?

Ans'r. He stated it of his own accord. I never asked him, because I regarded him as good as any man in the county for his contracts at that time.

By same. Do you remember distinctly that said Edmund Fitzgerald stated to you that the estate was in arrear to him, or is it merely your impression?

Answer. I think I remember distinctly that he made that statement to me.

By same. Has anything occurred lately to recall that fact?

Ans'r. Nothing has occurred to recall that fact, except that I have a distinct recollection that he named to me that the estate was in arrears to him, and proposed to trade those bonds. Nothing has occurred recently.

By same. You state that after the purchase of said bonds you ascertained that W'm Fitzgerald's estate was indebted in a large sum to said ex'or; in ascertaining that balance, were the said bonds taken into the estimate?

Ans'r. *Answer.* They were not; they were not put in that account

until the close of the account; they were estimated in a balance subsequently to the one referred to in the same account.

By same. In the purchase of said bonds did you or not make the discount on the principal regardless of the interest?

Ans'r. I did.

And further this deponent saith not.

G. D. NEAL.

Deposition of W'm Wimbish.

The deposition of W'm Wimbish, taken 30th May, 1870:

Question by pl't'ffs' counsel. State whether or not the accounts paid to you by Edmund Fitzgerald, as stated in your deposition taken (pursuant to notice, in a case pending in the circuit court of Pittsylvania County, Virginia, wherein Caddis B. Luck and wife are plaintiffs, and William T. Clark and John W. Holland are defendants) in Wimbish and Clark's store, at Catawba, Halifax County, Virginia, on the 26th day of May, 1870, were correct, and were for articles actually sold by you, and rightfully charged against the estate of William Fitzgerald, j'r, deceased.

Answer. The accounts referred to in the question are correct, and were rightfully charged against the parties named in my deposition referred to in the question.

And further this deponent saith not.

W'M WIMBISH.

105 *Deposition of Jno. E. Kennedy.*

The deposition of Jno. E. Kennedy, taken 3 June, 1870:

Quest. by pl't's' atty. State whether or not you know the terms on which Raleigh White, dec'd, purchased lands from Edmund Fitzgerald as ex'or of William Fitzgerald, dec'd; if so, state the time of the purchase and the terms.

Answer. He bought it in the fall of 1857. I think the last bond was due in 1860, and that was the only bond upon which he was to pay interest. One payment was made in money and in claims Rawley White had against William Fitzgerald.

By same. Was or was not W'm Fitzgerald indebted to said White at the time of the death of said Fitzgerald; if so, how much?

Ans'r. I think William Fitzgerald owed him about $400 (four hundred dollars) at that time.

By same. Did or did not any part of the purchase-money of said land bear interest for the first twelve months after the purchase?

Ans'r. I feel confident it did not.

By same. Was or was not the bond of said White for $1,000, filed with the answer of def't Barksdale, given in part of the purchase money of said land?

Ans'r. It was.

By same. State whether or not a paper filed, marked XX, is a statement of the purchase-money agreed to be paid for said land by said White, and in whose handwriting it is, if you know it.

Answer. It is; and I think it is in the handwriting of William Wimbish.

And further this witness saith not.

JOHN E. KENNEDY.

Deposition of Elisha Barksdale.

The deposition of Elisha Barksdale, j'r, taken 3d June, 1870:

Quest. by pl't's atty. State whether or not the paper marked XX and filed contains a statement of the terms on which Rawley White purchased land from Edmond Fitzgerald, ex'or of William Fitzgerald.

Answ'r. I have examined the paper referred to. The paper is in the handwriting of W'm Wimbish, a merchant, who resided at the time near Rawley White; and from the paper and the inspection of a bond dated 19th May, 1858, for $1,000, executed by Rawley White to Edmund Fitzgerald, executor of William Fitzgerald, payable 1st July, 1859, and from my recollection of the transaction at the time, I am satis-
106 fied that the paper marked XX does contain a statement of the terms on which said White purchased the land of Edmund Fitzgerald, ex'or of W'm Fitzgerald. The bond payable 1st July, 1859, was paid to me; and I think it more than probable that I was present when the bond due 1st July, 1860, was paid. I know I have seen the bond, and I think it more than probable that I made the settlement with Fitzgerald for Raleigh White. My impression is that neither bond carried interest.

By same. Where is Edmund Fitzgerald now?

Ans. He left this county during the late war; what year I do not remember. I have been informed that he resides in the State of Mississippi.

And further this deponent saith not.

ELISHA BARKSDALE, J'R.

Appendix.

The following are copies of certain papers filed in this cause:

Copy bond of A. W. Womack.

$1,000. On or before the 18th day of Nov'r, 1859, we promise and oblige ourselves, our heirs or assigns, to pay to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, the sum of one thousand dollars, lawful money of V'a, with interest from the 18th day of Nov'r, 1858.

Witness our hands and seals this the 1st day of Dec., 1857.

ARCHER B. WOMACK. [SEAL.]
JAMES M. ADAMS. [SEAL.]

Witness:
WILLIAM THOMPSON.

(Endorsed.)

I assign the within bond to G. D. Neal for value received this 15th June, 1859.

EDMUND FITZGERALD, *Ex'or.*
WIL'IAM FITZGERALD.

I assign the within bond to Richard Jones for value received this 2d July, 1859.

G. D. NEAL.

A copy of the original bond now on file in Pittsylvania County court in the suit of G. D. Neal, who sued for the benefit of Richard
107 Jones against Archer B. Womack, upon which a confession of judgment was made the 16th day of April, 1860.

Teste:

L. SCRUGGS, *D. C.*

MARCH 5TH, 1870.

In the clerk's office of the county court of Pittsylvania County, on the 16th day of April, 1860:

G. D. NEAL, WHO SUES FOR THE BENEFIT of Richard Jones, plaintiff, *against* ARCHER B. WOMACK, DEFENDANT. } In debt.

This day came the parties in their proper persons, and by consent the defendant acknowledged the plaintiff's action for the debt in the summons mentioned, besides the costs. Therefore it is considered that the pl'tiff recover against the def't one thousand dollars, with interest thereon at six per centum per annum from the 18th day of November, 1858, till payment, and his costs by him in this behalf expended. And the said defendant in mercy, &c.

Teste:

L. SCRUGGS, *Clerk.*

A copy. Teste:

L. SCRUGGS, *D. C.*

MARCH 5TH, 1870.

$2,293. On or before 18th day of Nov'er, 1860, we promise and oblige ourselves, our heirs, &c., to pay to Edmund Fitzgerald, ex'or of William Fitzgerald, dec'd, the just sum of two thousand two hundred and ninety-three dollars current money of Virginia, with interest from the 18th day of November, 1858, the same being a balance due on a land purchase.

Witness our hands and seals this the 1st day of Dec., 1857.

ARCHER B. WOMACK. [SEAL]
JAMES M. ADAMS. [SEAL.]

Witness:
WILLIAM THOMPSON.

(Endorsed.)

I assign the within bond to G. D. Neal for value received this 15th day of June, 1859.

EDMUND FITZGERALD,
Ex'or WILLIAM FITZGERALD.

108 I assign the within bond to Richard Jones for value received this 21st June, 1859.

G. D. NEAL.

A copy of the original bond now on file in Pittsylvania County court in the suit of Edmund Fitzgerald, ex'or of W'm Fitzgerald, j'r, who sues for the benefit of Richard Jones, against Archer B. Womack and James M. Adams, upon which a judgment was obtained the 21st day of March, 1861.

Teste:

L. SCRUGGS, *D. C.*

MARCH 5TH, 1870.

Pittsylvania County court, March term, 1861.

EDMUND FITZGERALD, EX'OR OF WILLIAM Fitzgerald, j'r, who sues for the benefit of Rich'd Jones, plaintiff,
against
ARCHER B. WOMACK AND JAMES M. ADAMS, defendants. } In debt.

This day came the plaintiff, by his attorney, and the judgment obtained at the rules in the clerk's office not having been set aside, and the defendant not appearing, it is therefore considered that the plaintiff recover against the defendants two thousand two hundred and ninety-three dollars, with interest thereon, at six per centum per annum from the 18th day of Nov'r, 1858, till payment, the debt and interest in the declaration mentioned, and his costs by him about his suit in this behalf expended. And the said defendants in mercy, &c.

A copy. Teste:

L. SCRUGGS, *D. C.*

MARCH 5TH, 1870.

Copy discharge of G. D. Neal.

636. United States district court, district of V'a.

Whereas Griffith D. Neal, of the county of Pittsylvania and State of Virginia, and district aforesaid, has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf: It is therefore ordered by the court that said Griffith D. Neal be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the twenty-fifth day of January, A. D. 1868, on which
109 day the petition for adjudication was filed by him, excepting such debts, if any, as are exempted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Richmond, in said district, this eleventh day of Feb., A. D. 1869.

[SEAL.] JOHN C. UNDERWOOD,
District Judge.

The estate of Capt. J. W. Smith, Nov., 1857, indebted to Edmond Fitzgerald,

For money expended in burial-case for his son, D'r Smith, of Georgia, and travelling expenses I paid of my own money, and for time lost in going for his son to be brought to V'a to be inter'ed, for which he promised to pay me but never did.

For tin burial-case	$65 00
Expenses for the workman's coming to grave, and sorting the tin case	2 50
Travelling expenses	72 50
Time lost in going	50 00
	$190 00
Interest for ten years	$114 00

THE STATE OF MISSISSIPPI,
Holmes County:

Personally appeared before the undersigned, an acting justice of the peace for said county, Edmond Fitzgerald, who, being duly sworn, state' that the above account is true and just, and that no part thereof has been paid.

Given under my hand and seal this 3d day of Oct'r, 1867.

W'M C. BINFORD, *J. P.* [SEAL.]

Account-sales of the property belonging to the estate of W. Fitzgerald, j'r, dec'd, made by Edmund Fitzgerald, j'r, executor, on the 19th day of November, 1857:

To Idsey B. Nunnally:

2 s'ithes and cradle	40	
1 do do	12½	
2 double tree	45	
1 fishing sa'ne	2 00	
1 dagon plough	2 00	
1 dutch and coulter	1 35	
1 table	4 00	
1 cu'ting machiene	2 45	
1 hill-side plough	3 00	
		$15 77½

110 To Willis A. Plunkett:

1 box ole irons	25	
1 do do	50	
1 bbl. 2 butter pots	50	
		$1 25

To Peter L. Berch:

2 spades, &c	1 65	
2 dagons ploughs	30	
		$1 95

To Jediah Vaughan:

2 ole axes	50	50
Amount carried forward		$19 47½
Amount brought forward	$19 47½	

To Doctor Anderson:

3 hillings hoes	45	
4 do do	80	
h'h'd	30	
2 dagon ploughs	1 05	
1 grindstone	2 10	
1 large kettle	55	
2 pots	25	
1 bbl	20	
1 coffee mille, &c	30	
1 wattering bucketts	65	
1 oven and led	1 40	
1 spinning whe'l	10	
2 bee gums	45	
8 split-bottom chairs	5 20	
2 setts plough gear	2 00	
1 barn of tobacco	36 00	
		$57 80

To Thomas Petty:			
2 axes	1 25		
1 dagon plough	2 55		
2 pickli dishes	55		
1 pan, &c	75		
1 large pitcher	55		
			$5 65
To W'm P. Barksdale:			
2 bread-trays	12½		
2 table-cloths	1 20		
1 sett towels 85 c'ts, sett k. forks	1 40		
1 book and brush	26		
			$2 98½
Amount carried forward			$79 91
111 Amount brought forward	$79 91		
To W'm Thompson:			
3 harrou theeth	65		
3 buckets	50		
1 skillet, &c	35		
1 oven lid	25		
1 p'r waffile irons	12½		
1 butter pot, &c	45		
1 pat and tubs bran	25		
1 gum of salt, &c	65		
1 lot soapt	45		
1 large meal-box	12½		
1 rocking-chair	25		
1 rat trape	25		
1 sell iv'ry knives and forks, $20	20 00		
1 bed, &c., $27.50	27 50		
1 lot spun cotton, $1.80	1 80		
1 p'r sheets	80		
1 can white greese	25		
1 sett chinia	4 75		
1 chamber pot	50		
2 bbls. of plaster	25		
2 mules' hides	70		
6 sheeps	15 00		
1 buckett	55		
1 lot shuck'	25		
1 pot and hooks	75		
18 bushels wheat, at $1.10	19 80		
			$97 20
To Samuel F. Anderson:			
1 brass kettle	3 05		
10 bushels wheat 6 5	10 50		
1 safe	4 00		
			17 55
Amount car. forward			$194 66

Amount brought forward		194 66
To R. V. Barksdale:		
1 lot shingles	.8 50	
1 sett table cloths	1 65	
1 looking glass	80	
I ewer basin	90	
1 sow and pigs	13 50	
1 fan mill	10 50	
1 p'r andirons	80	
112 5 hogs, $9.50	47 50	
1 cow and calf	20 00	
1 bureau, damage'	3 50	
		107 65
To W'm C. Terry:		
1 churn	2 75	
6 cane chairs	6 30	
1 large wagon	32 00	
1 calf	6 15	
		47 20
To John Petty:		
1 bee gums	60	
2 do. *do.* b'lls	80	
1 jug wine	70	
		2 10
To W'm T. Walton:		
Windsor chairs		1 00
To M'r's M. V. Fitzgerald:		
1 bed & &c		40 00
Am'unt car'i'd forwa'd		$392 61
Am'unt bro't forward		392 61
To William P. Smith:		
1 ro. chair	3 05	
1 buggy	150 00	
		153 50
To Serling B. Strange:		
1 bedste'd, &c		25 00
To W'm Wimbush:		
1 gun	1 75	
2 sets dishes	40	
1 p'r st'ake dishes	1 55	
1 set stone steps	4 35	
1 fat'ning sow	6 00	
1 saw pigs	10 00	
		24 05
To Jam's M. Davis:		
1 gun	13 00	
1 sid' leather	1 65	
1 p'r do	1 50	
		16 15
To J. N. Cole:		
1 lot broaches yarn	1 95	
1 box and contents	1 15	
		3 10

113	To Birde L. Davis:		
	1 counterpen'	1 15	
	3 winder curtains	25	
			1 40
	Amount car'ed forward		$615 35
	Amount brought forward		$615 35
	To Thomas E. Ingram:		
	1 counterpin	25	
	To John R. Jones:		
	1 p'r dishes	35	
	To James M. Farmer:		
	1 large dish	75	
	2 buckets, 31c	62	
			1 37
	To Jacob Anderson:		
	1 large dish	75	
	9 plates	85	
	1 wa'ter, &c	40	
	To Alexander Dotson:		
	1 pitcher	37½	
	2 bakers	55	
	1 pitcher and jug	55	
	1 butter pot — contents	25	
	2 tho'mometers	87½	
	1 cow and calf	22 00	
	1 p'r candlesticks	32	
			24 92
	To George Franklin:		
	1 wa'ter, &c	50	
			50
	Am'unt carr'ed forwa'd		644 75
	Am'unt brought foward		$644 75
	To James Bettertone:		
	1 sm'l dish	55	
			55
	To John W. Powers:		
	1 ladle	40	
	1 rake, &c	50	
	13¼ bbls. shorts com. 7–6	15 23	
			16 13
114	To Joshua Wood:		
	1 pitcher and jugs	30	
	1 basket — contents	60	
	1 saddle	8 25	
			9 15
	To James M. Woodson:		
	One castor	1 25	
			1 25

To Jamerson Russell:		
1 box *measty* semment	50	
6 wine-glasses	15	
1 brace and bitts	2 00	
		2 65
To Asy Coleman:		
Lot leather	1 45	
		1 45
To H. P. Ferguson:		
1 p'r candlesticks	50	
		50
Am'unt forward		$676 43
Am't bro't forward		$676 43
To John Hubbard:		
1 p'r glass bowles	25	
1 box of candles	40	
		65
To Thomas J. Dun:		
1 lot tumblers	87½	
1 sow and pigs	20 00	
		20 87½
To John S. Glass:		
1 pa'r candle-moulds	40	
		40
To John Slotivell:		
To 1 bridle, &c	2 25	
		2 25
To W'm A. Danman:		
To 4 knives and saw	1 05	
5 bbls. corn, 15c	12 50	
		13 55
To John T. Davis:		
To hatchett	1 30	
1 washstand	40	
		1 70
To J. M. Pollard:		
Parasol, beasweax, &c	12½	
Amount carr'ed forward		$715 98
115 Am't bro't forward		$715 98
To Stephen Coleman:		
To 1 bbls. tar		1 50
To Isaac M. Datson:		
Lot wool	3 90	
15 bbls. corn, 2.50	37 50	
2 pens shucks, 7.00	14 00	
		55 40
To S. M. Adkesson:		
1 padlock	40	
		40

To E. D. Waller:		
6 sheeps, 2d choice, 2.25	13 50	
7 do., 3 do., 2.10	14 70	
1 yoke oxen	60 00	
1 ox-cart	8 00	
		96 20
To Cha's U. Walker:		
5 hogs, 2 choise, 8.30	41 50	
1 stack fodder	2 75	
1 s. chain	85	
		45 10
To James F. Ferguson:		
6 hogs, 6.10	36 60	
		36 60
Am't carr'ed forward		$951 18
Am'u't bro't forward		$951 18
To J. Sheals:		
1 wagon-sheet	1 00	
To James Terry, s'r:		
1 wagon	30	30
To Richard White:		
1 horse	50 50	
		50 50
To Clabone W. Barkesdal:		
1 mule	167	
		167
To James C. Luck:		
1 horse	151 00	
		151 00
To Mah Bane:		
1 coult	39 25	
		39 25
116 To W'm White:		
1 cow	30 30	
1 do	25 00	
1 do	25 75	
1 do	23 00	
1 bull	11 05	
1 steer	9 65	
1 do	16 00	
2 calfs, 5.13	10 26	
		151 01
Amount forward		$1,540 94

Amount brought forward		$1,540 94
To J. B. Hardwick:		
Set wagon-gear	5 70	
		5 70
To W'm M. Farmer:		
Horse-collar	1 15	
		1 15
To J. P. Barkesdale:		
50 bbls. corn, 2.50		125 00
To John A. Farmer.		
2 sta'kes oats, 9.25	18 50	
4,946 lbs., 55	27 20	
Stretcher, &c	75	
		46 45
To Stephene D. Tucker:		
1 barn tobacco	65 50	
1 do. do.	133 00	
2 locks	31	
1 barn do.	300 50	
1 lock	25	
		501 56
To Abner McDowell:		
T' 5 bushels wheatt, 1.10		5 50
Am'unt forward		$2,226 30
Am'unt brought forward		$2,226 30
To H. J. Cole:		
1 lot strawr		2 45
To Berryman Bane:		
10 bu's wheat, a' $\frac{6}{10}$	11 00	
		11 00
117 To Thomas Anderson:		
1 half bushel	60	
1 lot trash wheat	3 05	
Turnips	2 90	
1 shovel and tongs	80	
1 raw hide	75	
		18 10
To James W. Douglass:		
Saddle	1 00	
		1 00
To William J. Dunn:		
Sow pigs	14 50	
		14 50
To A. B. Womack:		
1 syringe	1 00	
		1 00

To J. B. Nunnally:		
1 syringe	95	95
Am'unt forward		$2,265 30
Am'unt bro. faward		$2,265 30
To W'm Hill:		
1 white h'ifer	15 25	15 25
To S. F. Anderson:		
8½ bush. wheat, a 1.10		9 35
To Ralley White:		
398¼ acr's land, $10		3,982 50
To Archer B. *B.* Womasks:		
357¾ acr's land, $12		4,293 00
		$10,565 40

In the clerk's office of the county court of Pittsylvania County, on the 21st day of April, 1858, the foregoing account of sales was returned and admitted to record.

Teste:

L. SCRUGGS, *Clk.*

A copy—Teste:

L. SC'UGGS, *Clk.*

Pittsylvania County court, May 2d, 1870.

118, 119, 120 *Exceptions endorsed.*

The reading of this paper is excepted to because not signed by the ex'or, and because it does not appear to have been returned to the office by him or by his authority.

Counsel for Def'ts.

JAN'Y, 1871.

STATE OF VIRGINIA,
Pittsylvania Co., sct.:

I, John L. Hurt, clerk of the circuit court for the county of Pittsylvania, in the State aforesaid, do certify that the foregoing is a true transcript from the record and proceedings in a certain suit in chancery, lately pending in the circuit court of said county, between William T. Clark and others, plaintiffs, and Caddis B. Luck and wife and others, defendants. In testimony whereof, I hereunto subscribe my name this 4th day of July, 1871.

JOHN L. HURT.

Fee for copy record, $60. Ch'd to L. Scruggs and M. T. Smith, ex'or of R. Jones.

121 And at another day, to wit, at a supreme court of appeals of Virginia, held on the 16 day of December, 1873, in pursuance of the first section of the act of the general assembly entitled "An act

to provide a special court of appeals," approved February 28, 1872, the court doth certify this case to the said special court, to be tried or disposed of by said special court.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 19' day of December, 1873, came the parties in this cause, by their counsel, and on their motion and for reasons appearing to the court, it was ordered that so much of the order entered by this court on the 16' instant assigning causes to the docket of the special court of appeals as embraces this cause, be and the same is hereby set aside.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 12 day of April, 1874, this cause was this day partly heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel, and continued till the Tuesday then next following.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 14' day of April, 1874, this cause was this day
122 further heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, and continued till the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 15' day of April, 1874, this cause was this day further heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, and continued till the morrow.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 16' day of April, 1874, this cause was this day fully heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, but because the court here was not then advised of its decree to be pronounced in the premises, time was taken to consider thereof.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 7' day of January, 1875, came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that Richard Jones, the testator of the appellants, did not participate in nor become accountable for any devastavit committed by the appel-
123 lee, Edmund Fitzgerald, ex'or of William Fitzgerald, dec'd, of the assetts of the latter in regard to the bonds of Archer B. Womack and James M. Adams, to said Edmund Fitzgerald, ex'or, as aforesaid, assigned by him to Griffith D. Neal, and by said Neal to said Jones, and in the decree appealed from mentioned, that the said appellants, as ex'ors of said Jones, are not liable to pay the amount of the said bonds, or any part thereof, out of the assetts of their said testator, or otherwise, to any person or persons whomsoever, and that the said decree, so far as it is in conflict with the foregoing opinion, is erroneous; but that there is no other error in the same; therefore it is decreed and ordered that the said decree, so far as it is above declared to be erroneous, be reversed and annulled; that in all other respects it be affirmed, and that the appellees, Clark & Holland, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to render such decree as the said circuit court ought to have rendered, in lieu of so much of the decree of said court as is hereby reversed as aforesaid, it is further decreed and ordered that the bill of the complainants in the court below be dismissed as to the
124 said Jones and his said executors, and that the said complainants

pay to the said executors the costs by them and their said testator about their defence in this suit in the said circuit court expended, which is ordered to be certified to the said circuit court of Pittsylvania county.

The reasons in writing for the opinion of the court, as stated in the foregoing order, are in the words and figures following, to wit:

Opinion.

The main, if not the only, substantial question involved in this case is as to the liability of persons on the ground of having participated in a devastavit committed by an executor in selling a portion of the assets of his testator & converting the proceeds of sale to his own use.

There can be no doubt but that an executor is invested with the legal title to the assets of his testator which come to his hands for administration, whether they arise from personal estate or from real estate directed by the will to be sold for the payment of debts & legacies, & sold accordingly by the executor.

Nor can there be any doubt but that a bona fide purchaser, for value & without notice, of a portion of such assets, either directly or
125 indirectly, from the executor, will acquire a good title thereto, even though the executor commit a devastavit by making the sale for the purpose of converting the proceeds to his own use, & by actually so converting them.

Nor can there be any doubt but that if the purchaser be privy to the intended devastavit of the executor at the time of the purchase, or fraudulently contribute to such devastavit in any way, such purchaser will be liable for the loss sustained by creditors, legatees, or others by reason of such devastavit.

Nor can there be any doubt but that the executor in this case, Edmund Fitzgerald, j'r, committed a devastavit by selling and converting to his own use bonds taken for the purchase-money of land of his testator, William Fitzgerald, j'r, directed by the will to be sold for the payment of debts & legacies.

The only question remaining to be considered in this case, therefore, is whether the purchasers of said bonds, claiming directly or indirectly from or under the said executor, were at the time of their purchases respectively privy to his intent to commit such a devastavit or otherwise contribute to the commission of the same.

126 And this question arises as to three different parties, whose cases involve different facts & somewhat different principles, & must therefore be considered separately. Those three parties are G. D. Neal, Richard Jones, and Elisha Barksdale, j'r. The court below decided the question against the first & second of these three parties & in favor of the third, & pronounced a decree accordingly. This appeal was taken from that decree. Is it erroneous; & if so, in what respect?

We will consider the case of each party in the order in which he is above named; but before we do so we will notice some matters of fact & law which apply alike to all the cases and seem to be material to be stated; and,

First as to matters of fact. The testator died in September, 1857, leaving, besides his slaves, which he directed not to be sold, an estate which exceeded in value the amount of his debts by about eight or ten thousand dollars; and leaving as the only objects of his bounty his wife & posthumous child, with the exception of a legacy of $20 to the Rev. C. C. Chaplin, & a contingent devise to his brother & executor, Ed-

mund Fitzgerald. The executor, at the time of his qualification as such, in October, 1857, was a man of large property & undoubted solvency, & it seems continued to be until he removed from the State in
127 1862. His executorial bond was in the penalty of $34,000, & his original sureties were Sexton W. Smith & Samuel Bradley. On the 19th of November, 1857, he sold the whole estate, real and personal, which was subject to sale under the will, & returned an account of sales, which was duly recorded. The whole amount of the sale was $10,565.40, including two tracts of land, one of which was sold to Raleigh White for $3,982.50, & the other to Archer B. Womack for $4,293. The land was sold on a credit of one, two, & three years, & the purchasers executed their bonds for the purchase-money, payable to the executor as such. The assignments made of some of these bonds to the three parties before named respectively were all made in the spring & summer of 1859, & each bond had at the time of its assignment some time to run to reach its maturity, and the purchaser or assignee in each case paid less than would have been due upon the bond after abating the legal discount. Some time in the last-named year, 1859, the testator's widow, Martha W., intermarried with Caddis B. Luck. In March, 1859, Com'r Clarke reported a settlement of the executorial account of said executor, showing a balance due him on the 21st of that month of $765.41; and in 1860 the same com'r reported another settlement,
128 showing a balance due the executor on the 21st of March, 1860, of $1,122.94. But these accounts did not embrace any credits to the estate on account of sales of realty, on which account it appears the executor had received money which, if brought into the said settlements, would have made him a debtor instead of a creditor to the estate. In September, 1860, Luck & wife brought their suit in the circuit court of Pittsylvania County to obtain a settlement of the executorial account and to recover their portions of the said testator's estate, making the said executor & Martha W. Fitzgerald, her child by the said testator, defendants to the suit, but not making the sureties of the executor parties. In May, 1861, the said executor having, it seems been ruled to give a new executorial bond with sureties, accordingly gave one in the same penalty of $34,000, with John W. Holland & W'm T. Clark as his sureties. In November, 1862, the said Luck made oath before a justice of the peace of said county that he believed that the said executor was indebted to him & his wife and the said Martha W. Fitzgerald in at least the sum of $10,000, which they would recover in the said suit, & that he had probable cause for believing, & did believe, that said executor, Edmund Fitzgerald, was
129 about to quit the State unless he should be forthwith apprehended; and thereupon the said justice ordered the said executor to be held to bail in the said suit in equity in the sum of $10,000. The said Luck, with said Holland & Clark as his sureties, entered into a bond before the said justice in the penalty of $10,000, reciting that the said Luck was about to issue a writ of copias ad respondendum against the said Edmund Fitzgerald in the said suit in equity, & conditioned for the payment of all costs & damages which might be awarded against said Luck or sustained by said Fitzgerald by reason of the arrest of the latter under said writ. And the same having been accordingly issued, was executed on the said Edmund, who thereupon gave as his bail, in the sum of $10,000, A. L. H. Muse. The said bail it seems was insolvent when taken, & has ever since remained so; but no proceeding has ever been had to subject him to liability on his recognizance, nor to subject the sheriff or his securities to liability for taking insufficient

bail. Soon after giving said bail, it appears that the said Edmund left the State, & he has never since resided therein. About that time he ceased to be executor of W'm Fitzgerald, whose estate was there-
130 upon committed to Coalman D. Bennett, sheriff of said county, for adm'on de bonis non, with the will annexed, who never received any assets, & has since died; & the estate has since been unrepresented, there being in fact no unadministered estate. In June, 1868, the said Luck & wife amended their bill, making the said sureties, Holland & Clark, defendants thereto, in addition to the original defendants. In October thereafter, the said sureties filed their answer, in which, among other things, they say that "at the time of their joining in said bond, said ex'or was deemed by them & was generally considered able to pay his debts & liabilities, & he satisfied these respondents that he owed nothing or very little to the estate of his testator. Indeed his accounts as personal representative, settled by the proper officer, showed this." In February, 1869, the said sureties, Clark & Holland, brought their suit & filed their bill in the same court, to which they made the said Luck & wife, Martha W. Fitzgerald, C. D. Bennet, late sheriff, & as such adm'r as aforesaid, Edmund Fitzgerald, late ex'or as aforesaid, G. D. Neal, Richard Jones & Elisha Barksdale, j'r, & John Cannady, adm'r, with the will annexed, of said Raleigh White, defendants.
The complainants set out in their bill an account of the proceed-
131 ings which had been had in the aforesaid suit of Luck & Wife vs. Fitzgerald, &c., & exhibit a copy of the record thereof. They "charge that the proceeds of the sales of said lands were, in fact, never collected by said ex'or; but the bonds executed by the purchasers of said land were sold at a very heavy discount to the persons hereinafter mentioned, at a time when there was no necessity for so doing, the estate being abundantly able to pay all the debts of the testator without any sacrifice of the assets, the ex'or not being then in advance to any considerable amount to said estate; and if he had been, said estate being able to pay him said amount without sacrifice of the assets, & said ex'or holding no debt against the estate; all which facts were well known to the purchasers of the assets hereinafter mentioned, & to each of them." The complainants then set out in detail what are charged to be the facts in regard to each purchase, after which they say they "are advised that, by reason of the premises, the said ex'or has committed a devastavit in the disposal of said bonds, & that said Neal, Jones, Barksdale, & White have participated therein, & are each, & the estate of said White, responsible to your orators for the amount of the bonds
132 purchased by each as aforesaid, in consequence of the participation which each of them has had in the devastavit aforesaid, they having applied to said Bennet to recover the same, who refuses to do so, having no assets to pay cost, & is willing that your orators should sue therefor. They are advised that they may be substituted to the rights of the devisees & legatees under the will of the testator to charge the parties aforesaid for the assets so as aforesaid unlawfully appropriated to their use, & that, because your orators fear they may be subjected to a charge of said devisees & legatees, they may call the parties aforesaid to account for said assets as a necessary step in the settlement of the administration of said ex'or, & to aid them in the defence of the suit aforesaid of Luck & Wife," &c., "to which bill they file this as a cross-bill, & pray that both cases may be heard together, & that any decree which may be rendered against your orators as sureties as aforesaid, in favor of said Luck & wife & said Martha W. Fitzgerald, may be rendered, first, to be satisfied by said Neal,

Jones, Barksdale," &c., "to the extent of any amount of testator's assets which they or either of them may have illegally acquired as aforesaid." The complainants then, after making
133 the persons before named defendants to their bill, propound special interrogatories to said Neal, Jones, Barksdale, &c., & pray for special & general relief, suitable to the case made out in their bill. The two suits separately progressed to final decrees; answers & depositions having been filed, accounts settled, & orders made from time to time, which it is unnecessary now further to refer to. The final decree in Luck & Wife v. Fitzgerald was entered on the 7th of November, 1870, by which the said Fitzgerald & Clark & Holland, his sureties as aforesaid, are decreed to pay the balances ascertained to be due from said Fitzgerald, ex'or as aforesaid, to said Luck & wife & Martha W. Fitzgerald, respectively, the balance due to the former being $2,172.56, & that to the latter $6,022.68, with interest on each from the 20th day of October, 1862, and also to pay to the plaintiffs their costs expended in the prosecution of the suit. The final decree in Clark & Holland vs. Luck, &c., was entered on the 7th day of June, 1871, by which the plaintiffs' bills were dismissed with costs as to the defendants, Barksdale & Kennedy. "And the court being of opinion that the bonds of $1,000, executed by A. B. Womack & J. M. Adams to Edmund Fitzgerald, ex'or of W'm Fitzgerald, dec'd, on Dec'r 1st, 1857, payable on or be-
134 fore the 18th day of Nov., 1859, with interest from the 18th Nov., 1858, assigned by the said ex'or to the said G. D. Neal on the 15th day of June, 1859, & by him to the aforesaid Richard Jones on the 2d day of July, 1859; & of $2,293 executed by the said Womack & Adams to the said ex'or on the 1st day of Dec'r, 1857, payable on or before the 18th day of Nov., 1860, with interest from Nov. 18, 1858, & assigned to the defendant Neal on the 15th day of June, 1859, & by said Neal to the aforesaid Richard Jones, dec'd, on the 21st day of June, 1859, were each illegally transferred by the said Edmund Fitzgerald, ex'or as aforesaid, to the defendant G. D. Neal, by which transfer a devastavit of said assets was committed by the said ex'or, in which the said Neal illegally participated; that said transfers by said Neal of the said bonds to the said Richard Jones in his life-time were also illegal, in consequence of the knowledge of the said Jones, at the time of the transfers to him, of the illegal transfers thereof to the said Neal." And the court being further of opinion that said Edmund Fitzgerald & G. D. Neal, and the defendants, Scruggs & Smith, ex'ors of said Jones, out of the assets of their said testator, are liable to pay the amount of said bonds, includ-
135 ing principal & interest, to those entitled thereto; the court accordingly decreed such payment to be made in exoneration of the plaintiffs, Clark & Holland, as sureties aforesaid, & on account & in part discharge of the d ecree rendered against them in Luck & Wife vs. Fitzgerald, &c., on the 7th of Nov., 1870, as aforesaid. And it appearing to the court that the defendant, C. D. Bennett, late sheriff, & as such adm'r de bonis non with the will annexed of W'm Fitzgerald, was dead, & that no further adm'on had been taken on the estate of said Fitzgerald; and it further appearing that all the debts due from the said estate had been provided for, and that all the debts due to the said estate had been collected, except those mentioned in the said decrees, the court did not deem it proper to delay the cause for the appointment of a personal representative of said Fitzgerald, & for making him a party to the suit. And the defendants, Fitzgerald & Neal, out of their own estates, & Smith & Scruggs, out of the assets of their testator, Jones, were decreed

to pay the plaintifts' costs of suit. From this decree the appeal in this case was taken.

136 In stating the material facts of the case, which apply to all the parties sought to be made liable, as participants in the devastavit of the executor, the following additional facts may be worthy of observation. The executor was the brother, & probably the only brother, of the testator, who reposed great confidence in him by appointing him his executor & investing him with ample powers as such over his whole estate, real & personal. The executor, as we have seen, was "a man of large property & undoubted solvency," & so continued to be until he removed from the State in 1862. Though the sale of the bonds was made by the executor in 1859, & it must have been generally known to the parties concerned that such sale had been made, & that the money had been received by the purchasers from the obligors in the bonds, yet no question appears ever to have been raised as to the liability of the purchasers until about ten years after the purchases were made, seven years after the executor had removed from the State, & four years after the end of the war, which had reduced him to utter insolvency; & then, to wit, in 1869, they were sued, not by the creditors or legatees of the testator, nor by his adm'or de bonis non with the will annexed, but by the sureties of the executor, who became such in 1861, after the

137 suit of Luck & wife had been brought against him, & after he had been ruled to give a new bond with surety. Even then it appears the ex'or was still "a man of large property & undoubted solvency," & non constat that if he had not given a new bond with sureties he could not & would not have been compelled to account for & pay what he owed to the legatees of his testator. The sureties became such long after all the bonds for the purchase-money of the land sold by the ex'or had become payable, & no doubt after all, or nearly all, of it had been actually paid. It does not appear that the legatees or any other persons interested in the subject have sustained any damage from the sale of the bonds, or that if the executor had received the full amount of them from the obligors or from the purchasers, which he certainly had a right to do, he would have accounted for the same to the legatees.

Having noticed such matters of fact as are applicable to all the cases alike & seem to be material, we proceed now to make a statement in the same general way,

Secondly, as to matters of law.

138 All the cases agree in the principle that a *that a* purchaser from an executor of personal property of the testator, for valuable consideration, need not inquire, & has no adequate means of enquiry, whether the condition of the testator's estate requires a sale of the property, & is not bound to see to the application of the purchase-money; but may fairly presume that the sale is rightly made, & that the purchase-money will be properly applied; and that such a purchaser can only be made liable on the ground of a fraudulent participation with the executor in the commission of a devastavit of his testator's estate. In other words, that the purchaser must be guilty of a fraud in that respect. The only diversity in the cases seems to have arisen from the different views of judges as to the nature of the fraud within the meaning of the principle; that is, whether there must be actual fraud, or whether it is enough that there is implied or constructive fraud, or gross negligence on the part of the purchaser, which may be equivalent to fraud. Leading among them were the cases of Nugent v. Gifford, 1 Atk., 463; & Mead v. Lord Orrery, 3 id., 235, decided by Lord Hardwick; and Whale v. Booth, (cited in 4 Tenn. Rep., 625, note,) decided by Lord Mansfield. In the first-named case the ex'or assigned over a mort-

139 gage term of his testator to C., in satisfaction of a debt which the ex'or owed him, yet Lord Hardwick held it a good alienation against the creditors & heir. He said the court would follow the assets in case of fraud, but not where the ex'or disposed of them for a valuable consideration & without fraud, & that it would be very mischievous if the court were to control this power of alienation, as no person would venture to deal with ex'ors." "There was no difference between the power of the ex'or to dispose of legal & of equitable assets." To the same effect are the other cases. But subsequent cases have modified and restrained the extent of this doctrine in some respects. Leading among these are the cases of Bonney v. Ridgard, 1 Cox, 144; Scott v. Tyler, Dickens, 712; & Hill & Simpson, 7 Ves., 152. In the first of these cases, Lord Kenyon, master of the rolls, admitted that in general the purchaser from the ex'or of the testator's assets, was not bound to see to the application of the money; but that if upon the face of the assignment of the property it appeared to have been made in satisfaction of a private debt of the ex'or, the sale was fraudulent against the persons interested under the will, & equity would relieve. It
140 would be a case of implied fraud, & he accordingly condemned the decision of Lord Hardwick, before mentioned, & said he would have made an opposite decision in that case. In Scott v. Tyler, Lord Thurlow held that where an ex'or pledged bonds specifically devised, as a security for his own debt, the pawnee must deliver up the bonds for the benefit of the specific legatee. He admitted that in general the purchaser of the assets had no concern with the application of the price; & that the rule applied equally to mortgages, bonds, & leases. But if one concerted with the ex'or to obtain the effects at a nominal price, or at a fraudulent undervalue, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of ex'or, the purchaser or pawnee will be liable. In this case, bonds of the testator were delivered to the bankers as security for the private debt of the ex'ix, & they were ordered to be delivered up & the bankers to account for the interest received; & though the bankers believed the representation of the ex'ix without looking at the will, it was not sufficient to protect them. They knew that the bonds could not be so appropriated until all the debts & legacies were paid;
141 & the chancellor must have proceeded on the ground of gross negligence or implied fraud in the bankers. In Hill v. Simpson, Sir W'm Grant made a similar decree, by setting aside the transfer of assets by an ex'or to secure his own debt, under circumstances of gross negligence, though not of direct fraud in the creditors to whom they were transferred. These & other cases on the subject are fully reviewed by Chancellor Kent, in Field v. Schieffelin, 7 John. Ch. Rep., 150, a leading case, & one which goes very far in favor of a bona-fide purchaser in such cases. That was a case of a purchaser from a guardian. After getting through with his review, he thus concludes: "I have thus looked pretty fully into the decisions in the analogous case of a purchase from an ex'or of the testator's assets; & they all agree in this, that the purchaser is safe, if he is no party to any fraud in the ex'or & has no knowledge or proof that the ex'or intended to misapply the proceeds, or was in fact by the very transaction applying them to the extinguishing of his own private debt. The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding that the ex'or was applying the assets to
142 his own private purposes as the payment of his own debt. The latter & the better doctrine is that in such a case he does buy at

his peril; but that if he has no such proof or knowledge, he is not bound to enquire into the state of the trust, because he has no means to support the enquiry; & he may safely repose on the general presumption that the ex'or is in the due exercise of his trust."

In Graff, &c., v. Castleman, &c., 5 Rand., 195, Judge Carr, in an opinion in which Judges Cabell, Coalter, & Green concurred, reviewed the cases on the subject, at the conclusion of which review he said: "The latest English case that I have met with is Keene v. Roberts, 4 Mad. Ch. Rep., 332. There the V. C. gives the result of an examination of all the cases thus: 'Every person who acquires personal assets by a breach of trust or devastavit in the ex'or is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the ex'or at the time any part of the personal assets, whether specially given by the will or not, because this sale or pledge is held to be prima facie consistent
143 with the duty of an ex'or. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is prima facie inconsistent with the duty of an ex'or. I preface both of these propositions with the words generally speaking, because they both seem to admit of exceptions.'"

Other cases on the subject have been decided by this court, but it will be necessary to notice only a few of them which have a strong bearing upon the case now under consideration. They are Fisher v. Bassett, &c., 9 Leigh., 119; Pinkard v. Woods, &c., 8 Gratt., 140; & Cocke v. Minor, &c., 24 id. In Fisher v. Bassett, the case is thus stated by the reporter: "An adm'or takes a bond to himself individually for a debt due to his intestate's estate, payable at a distant day, & then sells the bond at a discount of 25 per cent. to an assignee who knows that the consideration of the bond was a debt due to the intestate's estate, but is informed, & so informed as to justify him in believing, that the
144 adm'or has acquired the full property in the bond in his own right. Held, this is such a dealing with the assets of the intestate's estate, such a concurrence of the assignee with the adm'or in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the adm'or's conduct on the assignee; & if the adm'or had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee cannot in equity avail himself of the transfer." "The sale of the bond at so large a discount,' said Tucker, P., "was itself prima facie a devastavit, & the burden of proof is upon Scott or Fisher that the necessities of the estate & not those of the adm'or required the sacrifice." He spoke of the sale as having been made "at the ruinous rate of 25 per cent., without evidence, as far as yet appears, of the necessities of the estate requiring such a sacrifice." Parker, J., agreed in the opinion that there was such a dealing with the assets as to render the transfer of the bond prima facie void. "When Fisher bought the bonds," said the judge, "at so much less than their value under the circumstances
145 existing in the case, he took on himself the risk of showing either that Scott was the real owner of them, or that the necessities of the estate justified the sacrifice."

In Pinkard v. Woods, &c., the case is thus stated by the reporter: "An ex'or, who is also a legatee of one moiety of his testatrix's estate, sells the property & purchases about one-half of it himself. He takes

bonds from the purchasers of the other part of the estate, which show upon their face that they are executed to him as ex'or. Afterwards he sells these bonds at a discount of from 18 to 20 per cent., the purchaser knowing that the liabilities of the estate of the testatrix were very inconsiderable, & that the sale of the bonds was not necessary for any purposes of the adm'or. At the time of the sale the ex'or was solvent, & his solvency was not questioned; but he afterwards failed, without paying the legatees of the other moiety of the estate. Held, that the sale of the bonds at such a discou nt, when the circumstances of the estate did not require it, was a devastavit by the ex'or; & that the purchaser having purchased with a knowledge of the fact, will be compelled to pay the amount of the bonds (if they do not amount to more than the devastavit of the ex'or,) to the legatees. Or if they have
146 been paid by the sureties of the ex'or, the sureties are entitled to be substituted to the rights of the legatees." Baldwin, J., delivered the opinion of the court, in which all the members of the court, four in number, concurred. He said: "It is the duty of an ex'or not to sell, but to collect the debts due to the estate of his testator, including those arising out of the sales of goods made by the ex'or in the course of his administration; & if he sells such debts at a price below their value, he thereby commits a devastavit, unless he makes it appear that such sale was manifestly required by the interests of the estate; and this he can never do without showing in the first place that the proceeds thereof have been applied to the purposes of the estate." "And the purchaser himself so acquiring such debt at a profit, if he has reason to believe at the time that the same belongs to the estate, & is so disposed of by the ex'or for his individual uses, thereby concurs in such fraudulent breach of trust by the ex'or, & therefore incurs the like liability." The bonds were on their face payable to the adm'or in that character. "The appellant had, therefore, the best reason to believe that the bonds belonged to the testatrix's estate, when he purchased them from
147 the adm'or at a discount of 18 or 20 per cent.; & from the profit he was thus allowed to make, he had good reason to believe that the adm'or was selling them for his own individual uses, a fact which the result & the condition of the estate have abundantly shown. Under these circumstances it was incumbent on the appellant to stay his hand, until he should ascertain, by the requisite enquiries, that the sale was to be made for the purposes of the estate, & the sacrifice to be incurred indispensably necessary to prevent some still greater sacrifice." "If he had made the enquiry, he would have ascertained that the condition of the estate did not require the sale of the bonds. But in truth he knew it, without the necessity of enquiry," &c. "It is no valid defence for the appellant that at the time he purchased the bonds, it was his belief, & that of the public generally, that the adm'or was then in solvent circumstances. Such belief may have induced him to look to the individual responsibility of the adm'or as a guarantee against the failure of his speculation, & to that responsibility he must still look; & its having proved abortive furnishes no reason for throwing the consequent loss upon those whom he has aggrieved by his intermeddling with the affairs of the estate, from no other motive than the desire of gain
148 to himself, & careless as to its effects upon the rights of others."

In Cocke v. Minor, &c., the question was as to the liability of a purchaser from a trustee at a heavy discount (twenty per cent.) of bonds belonging to a trust-fund. Judge Bouldin, in delivering the opinion of the court, said: "That the conversion into money by a trustee of well-secured bonds belonging to a trust fund, by a sale thereof at a large

sacrifice, to a purchaser with full notice of the trust, does constitute such an improper dealing with & devastavit of the trust subject, as will render both trustee & purchaser prima facie responsible therefor, is a proposition about which, at this day, there can be no doubt;" and the cases of Fisher v. Rassett, &c., & Pinkard v. Woods, &c., supra, were referred to in support of the proposition & fully stated in the opinion. After referring to an allegation in the answer of the purchaser, that from such information as he had, he believed the trustee wanted the money for proper purposes, without stating what that information was, or indeed that he had any, except from the trustee himself. The court further said: "Admit it all to be true; and admitting further, what is neither shewn nor
149 even alleged, that this information was of such character as to justify the belief arrived at; still, under the principles established in the cases referred to, that belief, however it might acquit him morally, would not be enough to discharge him from legal responsibility. He was acting at his own risk, & would be bound to shew that what he thus believed was in fact true. Vague impressions of that character cannot be received as a ground on which the rights of others are to be bartered away."

The case of Hunter v. Lawrence's ad'r, &c., 11 Gratt., 111, is an important case, & was much referred to in the argument. There may be occasion to state the purport of it, but for the present at least it is not deemed necessary to do so.

We will now consider the case of each of the said three parties, Neal, Jones & Barksdale, separately; and,

First, as to Neal. This case comes within the principle laid down in the cases of Fisher v. Bassett, &c., Pinkard v. Woods, &c., & Cocke v. Minor, &c., & he is clearly liable for the amount of bonds purchased by him, unless he is discharged from such liability by laches & lapse
150 of time, or his certificate in bankruptcy; a question which will be considered presently. He was not guilty of actual fraud in making the purchase; but, according to the cases referred to, he was guilty of constructive fraud, which was sufficient to implicate him as a participant in the devastavit certainly committed by the ex'or. The bond was payable to the executor in that character, which gave express notice to the purchaser that it belonged, in its origin at least, to the testator's estate; and he bought it from the executor at a discount of eighteen per cent. Nothing but the necessities of the estate could have justified the executor in making such a sale, unless the bond had become the individual property of the executor by his advancements made on account of the estate, or otherwise. To be sure, the purchaser did not know the condition of the estate, & was informed, & no doubt believed, that the estate was indebted to the executor, & that the sale was made on that account. But the purchaser, having made the purchase under the circumstances aforesaid, made it at his peril, and subject to the risk of the sales having been properly made, or of the amount of the bonds being fully accounted for by the executor to the estate, neither of which turned out to be the case. If he had made enquiry before
151 he made the purchase, he could easily have ascertained that the sale would be a breach of trust, & a devastavit by the executor. He ought to have made such enquiry, but he did not do it. He relied on the solvency of the executor, and his ability & willingness to make everything right, and he did not think it worth while to trouble himself in making enquiries about the estate. Having been disappointed in that expectation, he cannot justly complain that he must be regarded as particeps criminis in the wrong of the executor. In a controversy

involving the question of a devastavit by the executor, in a sale of bonds belonging to his testator's estate, & of the participation of the purchaser therein, the burden of proof devolves on the purchaser to show that the executor required the sale, on the terms on which it was made, or that the bonds belonged to him individually, or, at least, that he had fully & properly accounted for the amount of the bonds to the persons entitled thereto. We cannot distinguish this case from that of Pinkard v. Woods, &c., upon the question whether the purchaser participated in the devastavit committed by the executor in the sale of the bonds, & we therefore decide that he did so participate, & is liable accordingly,
152 unless he is discharged from such liability by laches & lapse of time, or his certificate in bankruptcy. Whether he be so discharged or not, we will not stop to enquire, and, 1st, as to laches & lapse of time.

Upon this question we have had some difficulty. The sale of the bonds was made in 1859. The ex'or was then a man of large property & undoubted solvency; & so continued to be till he removed from the State, in 1862. There can be no doubt but that during that period he had ample means to pay the amount of the bonds, & could have been compelled to do so, either by the legatees or by the purchasers, if the former had claimed to hold the latter liable. If the appellees, Clark & Holland, had not become sureties of the executor in his new executorial bond, it is not improbable that the executor would have been compelled to account for & pay the amount with which he was chargeable to the legatees. Had Luck & the said sureties who caused the ex'or to be held to bail in Luck & wife's suit, in Nov., 1862, enforced the liability of the sheriff & his securities for taking insufficient bail, the debt of the ex'or to the estate of his testator might, in that way, have been satisfied. It does not appear, & it is not probable, that it was pretended by anybody that the purchasers, or any of them,
153 had incurred any liability to the legatees, or anybody else, by reason of their purchases, until about the time the suit was brought against them by Clark & Holland in 1869, nearly ten years after the purchases were made, & soon after the ex'or had removed from the State. Nor does it appear that during that period an idea of any such liability occurred to any of the said purchasers. It does appear that they concealed the fact that they had become such purchasers, or that the fact was unknown to the public. Shortly after the maturity of the bonds, respectively, or those assigned to Neal, (the one assigned to Barksdale having been paid,) actions were brought upon them, & judgments recovered in the county court of said county, in the name of or for the benefit of said Neal or said Jones. It must have been known both to the legatees & the sureties, Clark & Holland, at least before the said executor was held to bail as aforesaid, that he had received or become accountable for the amount of the said bonds. If the ex'or had not sold the bonds, he would no doubt have collected them at or after maturity, & the same loss would probably, in that case, have occurred as
154 has actually occurred to the legatees or sureties on account of the default of the ex'or in regard to the said bonds. It may reasonably be said, therefore, that the loss is due rather to the laches & neglect of the legatees or sureties, or both, than to the acts or defaults of the purchasers.

But, in view of all the circumstances of the case, we have concluded that the purchasers, if they have made themselves liable on account of their purchases, ought not to be discharged from such liability by reason of the supposed laches & neglect of the legatees & sureties. If they are liable, it is because they were wrong-doers, & they cannot thus ap-

portion their own wrong, or escape liability therefor by throwing the loss upon those who have been guilty only of neglect at most. The purchasers ought to have taken care of themselves, & not to have trusted, as they did, to the ability & willingness of the executor to save them. One of the legatees continued to be an infant until after the institution of the suit against the purchasers, & to her at least laches is not imputable. The intervention of the war, the existence of stay-laws, & the legal suspension from time to time of the act of limitations, seem to obviate the effect of lapse of time in the case. In Pinkard v.
155 Woods, &c., the court said: "Nor does the statute of limitations afford protection to the appellant, for the appellees have no remedy but in equity, which will not allow its application to such a case as this." The same may, perhaps, as well be said in regard to the defence of laches & lapse of time in this case.

2dly, as to Neal's certificate in bankruptcy: The 33d section of the bankrupt act declares, "that no debt created by the fraud or embezzlement of the bankrupts, or by his defalcation as a public officer, or while acting in any fiduciary character, should be discharged under this act." The purchaser, Neal, can be made liable in this case only upon the ground of his having fraudulently participated with the executor in a devastavit committed by the latter. He must, therefore, have been guilty of fraud to make him liable. A debt due by him on that account must be a debt created by fraud, whether the fraud be actual or implied. The act does not say "actual" fraud, or "moral" fraud; or qualify the word by any other adjective. It uses only the generic word fraud, which we must construe in its generic sense, unless the contract require a different construction, which we think it does not. Certainly if
156 the purchaser had actually colluded with the ex'or to commit a devastavit, his fraud would have come within the meaning of the act. Why does it not come within the meaning, as it certainly does within the letter of the act, when he has so dealt with the ex'or in regard to the assets of his testator as to make him liable for the amount of those assets upon the ground of his having been guilty of an implied or constructive fraud? It has precisely the same effect with actual fraud, in regard to the measure of his liability therefor. Why has it not the same effect in regard to his discharge in bankruptcy? Can this question of discharge be made to depend upon the degree of aggravation of the fraud? We, therefore, think that this is a "debt created by the fraud of the bankrupt," within the meaning of the bankrupt act, & that it is not discharged under the said act. This makes it unnecessary to decide, and we do not decide, whether it is a debt created by the bankrupt while acting in a fiduciary character in the meaning of the act.

It may be proper, in this connection, to notice further the case of Hunter v. Lawrence's ad'r, &c., before referred to, in which it
157 was held that even if the party who had received the bond from the guardian in that case could be made responsible to the ward, he was not responsible to the sureties. From which it may be, and indeed was, argued in this case that the purchaser, even though answerable to the legatees, is not answerable to the sureties. It seems to be a sufficient answer to that view to say that the party who had received the bond from the guardian in that case was guilty of no fraud, actual or constructive, & was a bona-fide purchaser for full value and without notice. In Pinkard v. Woods, &c., the suit was by the sureties who had paid the amount of the bonds to the legatees, and this court held that the sureties were entitled to be substituted to the rights of the leg-

atees. For the same reason, they would have been entitled, before payment, to maintain a suit, quia timet.

Secondly. As to Jones: His case differs from that of Neal in several important respects. Like Neal, he considered the ex'or a man of large property & undoubted solvency, & that he would be able & willing to meet all his engagements. And, like Neal, he knew nothing about the condition of the testator's estate, nor whether its emergencies were such
158 as to require or authorise the ex'or to sell the bonds of the testator at a discount. But, unlike Neal, he did not deal with the ex'or, nor see how the ex'or could have anything to do with the sale of the bonds by Neal to Jones. There was no connection, nor understanding between Neal & Jones in regard to the purchase of the bonds by Neal from the executor. They were certainly not so purchased for Jones, nor, so far as the record shows, with his knowledge; nor had Jones any interest whatever in that purchase. He found the bonds in the hands of Neal, with an assignment thereon to him from the executor, expressed to be for value received. Neal proposed to sell them to him; & believing, & having good reason to believe, that they belonged to Neal, & that Neal had a perfect right to sell them, he accordingly bought them at a moderate discount; & they were regularly assigned to him, "for value received," by Neal; & after their maturity he promptly brought actions upon them for his benefit, and recovered judgment & received the money, without being questioned by anybody as to his right to do so, until 1869, when this suit was brought.

When Jones bought the bonds of Neal, he did not know on what terms Neal had acquired them from the ex'or. They might, for aught he knew, have been assigned at their par value in payment of a debt due by
159 the testator's estate to Neal; or the emergencies of the estate might have required them to be sold at their market value by the ex'or; or they might have become the property of the ex'or in payment of a debt due to him by the estate or the legatees, or of advances made by him for either of them. That they were payable to the ex'or, as such, did not show that he did not part with them lawfully. The legal title to them was vested in him, & he had the right, & it might have been his duty, to sell them, as it certainly would have been to collect them at maturity if not sold before. The duty of a purchaser from an ex'or of a bond payable to him, as such, to make an inquiry as to the propriety of the sale, does not arise from the fact that the bond is so payable. The only effect of that fact is to inform him that the bond is a part of the assets of the testator. And an ex'or may lawfully sell the assets, whether they consist of a bond or anything else; & a fair purchaser cannot be held responsible, though he make no enquiry as to the propriety of the sale. That is a question to be decided by the ex'or, to whose discretion the testator & owner of the property has referred it; & persons may lawfully trust him & purchase assets from him without any inquiry, if the conduct of such persons in the transaction be fair. Confidence
160 being placed in the trustee "by the person who had the sole right to dispose of the property at his will," as was said by Marshall, C. J., in Garnett v. Macon, &c., 2 Brock., 185, 231, "no other can question the correctness of his proceeding, or can be justifiable in suspecting an intention to violate the trust. He has no right to suspect that the person who has been selected by the testator for its execution will violate the trust reposed in him; & no collusion between him & the trustee ought to be implied from equivocal acts." Davis v. Christian, &c., 15 Gratt., 46. If a person buying a bond from an ex'or, payable to himself, as such, have good reason to believe that the ex'or intends to misapply

the proceeds of sale, & thus commit a devastavit, it is incumbent on him to stay his hand until he can ascertain by the requisite inquiries that the sale is to be made for the purposes of the estate, & is such a one as the ex'or may make consistently with his duty. If such a bond be offered to be sold by an ex'or at a heavy discount, as, for instance, 18 or 20 per cent., that fact affords to the person to whom the offer is made good reason to believe that the sale is intended to be made for the use of the ex'or, & not for the benefit of his testator's estate; and such
161 person cannot safely make the purchase until he has first ascertained that it will be proper for the ex'or to make the sale. It has been decided in no case that a sale of a bond at a discount, however small, will afford sufficient reason to believe that a devastavit is intended by an ex'or. A sale of a bond at par, or abating only the legal discount for the time the bond has to run to its maturity, would certainly afford no reason for believing that a devastavit is intended; nor, we imagine, would a very small additional discount. It is often to the interest of an estate & agreeable to the legatees for such a sale to be made, especially in a case in which a bond has a long time to run. Suppose a bond which would probably have to be collected by suit is sold at a discount not more than equal to the ordinary expenses of collecting such a bond, would such a sale be a devastavit in the ex'or? The rule in regard to the sale of any property by an ex'or, including, we suppose, as well bonds as other property, is that, if it be sold at such a gross undervalue as to afford good reason to believe that the ex'or intends to commit a devastavit, the purchaser will buy at his peril, & ought, for his own safety, to make the necessary inquiries. But
162 who can say that a sale of a bond at a very small discount, the smallest at which it could possibly be sold, would be a sale at a gross undervalue? In the three cases before referred to, which are the only cases we have seen on the subject of a sale of bonds by an ex'or, the sale was spoken of as at a "sacrifice," & sometimes as at a "ruinous sacrifice." In Fisher v. Basset, &c., the sale was at a discount of 25 per cent. In Pinkard v. Woods, &c., it was at a discount of 18 to 20 per cent. In Cocke v. Minor, &c., it was at a discount of 20 per cent. In this case the sale to Neal was at a discount of at least 18 per cent. But the sale by Neal to Jones was at a very small discount; not as much probably as one-half of the last-named sum; & Neal proves that it was low. If, therefore, the bonds had been bought by Jones of the ex'or instead of Neal, we could not say that the bonds were sold at a gross undervalue or at a sacrifice. But if the bonds had some time to run when sold, & one of them, the larger, more than a year, actions had to be brought upon both of them. A long time elapsed before they were collected, & after paying the expenses of collection Jones probably received but little, if any, more than six per cent. interest on his money. To make him now pay the whole amount of the bonds, with inter-
163 est till payment, would be to impose a very heavy penalty upon him, certainly one exceeding his offence, whatever that may be, & far exceeding any loss which anybody can have sustained from his act; for nobody, in fact, can have sustained any such loss at all. The cause of the loss was complete before Jones became a purchaser. But Jones did not buy the bonds from the ex'or, & therefore does not come within the principle of the cases referred to. He was a bona fide purchaser, for value & without notice, from Neal, who was apparently a bona fide assignee for value from the exo'r, & had possession of the bonds, & only assigned & delivered them to Jones. He, Jones, gave full value for them, as much as could possibly be gotten in the market, & had no

notice whatever of any imperfection in the title. He obtained judgments on the bonds & collected the money without any question as to his title. Having the legal title to, & possession of, the subject, & at least as much equity as anybody else can have, there can properly be no recovery against him on account of the bonds. The only evidence which can be said to tend to implicate him in the breach of trust of the ex'or is, that Neal was in the habit of buying bonds at a greater discount than
164 legal interest, & that Jones knew the fact. A vague suspicion arising from such a circumstance is certainly not constructive notice; much less is it sufficient to make out a case of constructive fraud. If Jones was bound to make inquiry, so also would have been any subsequent assignee, however remote, & even the obligors themselves, in order to be safe in paying the bonds. An assignee of a bond for value & without notice, takes it subject to all equities of the obligor, but not to any equity of a third person; and even the equities of the obligor must be asserted in due time, & before the recovery & collection of the money.

We therefore think the decree against Jones's ex'ors is erroneous, & that as to them, the bill should have been dismissed.

Thirdly. As to Barksdale: A bond of Raleigh White for $1,000, dated the 19th day of May, 1858, payable on the 1st day of July, 1859, to Edmund Fitzgerald, j'r, ex'or of W'm Fitzgerald, j'r, being one of the bonds given by White for the land bought by him of said ex'or, was, on the 21st of March, 1859, assigned by the said ex'or to said Barksdale, who paid the full amount of the bond to the said ex'or, abating legal discount for the time the bond had to run, & deducting five per cent.
165 on the balance; and on the day after said assignment, to wit, the 22d day of March, 1859, the amount of said bond was paid by said White to said Barksdale, abating only the legal discount as aforesaid. Barksdale says in his answer "that the said assignment was made to enable this respondent to collect the said bond. The said Edmund Fitzgerald & Raleigh White were upon unfriendly terms. The said White was a singular man, & preferred the bond to be assigned to this respondent. This respondent agreed to collect the bond for a commission of five per cent.," &c. "The said Edmund Fitzgerald was at that time possessed of a good estate & in good credit, & this respondent had no suspicion that he intended to misapply the assets of his testator." "This respondent was, & is at this time, a practicing attorney, & supposed that he had a perfect right to collect any debt for the said Edmund Fitzgerald & pay it over to him," &c. The foregoing is the substance of the transaction as stated in the answer of Barksdale, upon which statement the question of his liability depends. The court below decreed that he was not liable, & dismissed the bill with costs as to him; and we think there is no error in the decree in that respect.
166 There was no contrivance between the ex'or & Barksdale to commit a devastavit in regard to the bond of White. If White had paid the money directly to the ex'or, instead of paying it through Barksdale, that would certainly have been a lawful payment; & yet the same loss would in that case have occurred as has occurred to the estate from the conversion of the money to the ex'or's own use. But the ex'or & White were on unfriendly terms, & the latter preferred not to settle the matter with the ex'or in person. Barksdale, an attorney, was therefore employed by the ex'or, on the usual terms, to collect the bond. And White, being "a singular man," preferred that the bond should be assigned to Barksdale, no doubt considering that that would be the best evidence of Barksdale's right to receive the money. This may have been

an unreasonable & awkward mode of settling the matter, but certainly the evidence is not sufficient to convict Barksdale of a fraud, which is necessary, to make him responsible as a party to the devastavit of the ex'or. A fraud should not be presumed, but must be plainly proved.

167 The most that can be said of the evidence is, that it may raise a question whether the five per cent. allowed to the attorney for collection ought to be allowed as a credit to the ex'or in the settlement of his account. Even if the transaction be considered as a sale of the bond by the ex'or to Barksdale at a discount of five per cent., it does not follow that Barksdale committed a fraud, actual or constructive, which would render him liable, as what we have already said in regard to Neal & Jones sufficiently shows.

There are some technical questions in the case which ought to have been before noticed; but as they were not, they will now be briefly disposed of.

1st. We think the court erred in striking out the demurrer to the bill, which was sufficient in form & substance. Code of 1860, p. 712, § 30, & p. 752, § 1. But this error was not to the prejudice of the defendants, as they were entitled to all the benefit at the hearing which they could have derived from action on their demurrer.

2dly. The bill was not multifarious. It was filed by the sureties of an ex'or against the ex'or, & the different purchasers from him, to

168 compel them to account for the assets of the testator, in regard to which it was charged that the ex'or had committed a devastavit, to which the purchasers were parties. It was obviously proper, & indeed necessary, that they should be united in the same suit, though the purchasers were different.

3dly. The bill is not a cross-bill, but an original bill, quia timet, which the sureties had a right to file, though they had paid nothing, & nothing had been recovered against them as such. They had been made parties to the suit brought by the legatees against the ex'or, and a decree was about to be obtained in that suit against both principal & sureties. In this state of danger & apprehended loss the sureties, considering the purchasers of the bonds from the ex'or liable to account for the same by reason of their fraudulent participation in a devastavit charged to have been committed by the ex'or in regard to the sale of the bonds, had an unquestionable right to file their bill quia timet against the said ex'or & purchasers to compel them to pay the amount for which they might be liable as aforesaid in case and exoneration of the sureties.

169 4thly. Though the bill of the sureties was an original & not a cross-bill, yet the court did not err in regarding the proceedings in the suit of the legatees against the ex'or & his sureties as evidence in the suit of the sureties against the ex'or & purchasers. The record in the former was made an exhibit in the latter suit, & the purchasers were called on in the latter suit to aid the sureties in the defence of the former suit, in which the executorial account had not been finally settled nor any depositions taken. There was a prayer in the bill in the latter suit that both cases might be heard together, & that any decree which might be rendered in the former suit in favor of the legatees against the sureties might be rendered first to be satisfied by the purchasers to the extent of any amount of testator's assets which they or either of them might have illegally acquired. And though the cases were not actually heard together, yet they might, & no doubt would have been, if any party had desired it. No objection was made to the proceedings in the former suit as evidence in the latter until the case came before this court, when it was too late to make the objection for the first time. If it had

170 been made in the court below, it would at once have been obviated by retaking in the latter suit the accounts & depositions which had been taken in the former.

5thly. Coalman D. Bennet, ad'r de bonis non with the will annexed of William Fitzgerald, having died before the final decree was rendered, & all the debts of said testator's estate having been paid as provided for, & there being nothing due to it except what was recovered in this suit, the court did not err in making a final decree without having a personal representative of said testator's estate before the court.

Having noticed and disposed of all the questions, both of form & substance, arising in the case, we think the decree appealed from ought to be reversed in part and affirmed as to the residue, in conformity with the foregoing opinion.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 16 day of January, 1875, came the appellees, Clark, Holland, and Neal, and filed their petition for a rehearing of the decree rendered herein on the 7 instant; and the court not being advised of its
171 decision to be rendered on said petition, time was taken to consider thereof; which said petition is in the words and figures following, to wit:

Petition for rehearing.

JONES' EX'RS
v.
CLARKE ET AL.

To the honorable supreme court of appeals of V'a:

Your petitioner, Griffith D. Neal, one of the appellees in the above-entitled cause, respectfully asks for a rehearing of the case, so far as the decision of this honorable court was adverse to his rights & interests.

Your petitioner shews that the decision against him was rendered by a court of three judges; that the question of the effect of his discharge in bankruptcy, in bar of the demand preferred against him, is one of novelty and great importance, and has never as yet, as your petitioner is advised, been passed upon by any court of last resort in the U. S., by the Supreme Court of the U. S.

172 Your petitioner further is advised that, upon the question of neglect and laches on the part of the complainants below, great difficulty was experienced by the judges who sat in the case in arriving at the conclusion announced.

The judgment of this honorable court bears with crushing weight upon your petitioner, who is a man advanced in years, with the care of a large family, and can ill afford a further prosecution of his appeal.

In view of the circumstances herein set forth, your petitioner prays that his case may be reheard by a full court.

GRIFFITH D. NEAL,
By Counsel.

And the appellees, W'm T. Clark & John W. Holland, petition for a rehearing of the case in omnibus, if it is to be reheard as to so much of the decree as affects the petitioner, Griffith D. Neal. They rely on ground they will set forth in writing.

W'M T. CLARK,
JOHN W. HOLLAND,
By Counsel.

JANUARY 16, 1875.

173 And at another day, to wit, at a supreme court of appeals of Virginia, held on the 18 day of February, 1875, came again the parties by their counsel, and the court having maturely considered the petitions of the appellees, Clark and Holland and Griffith D. Neal, for a rehearing of the decree rendered herein on the 7 day of January, 1875, was of opinion that in view of the "novelty and great importance of the question mentioned in the petition of said Neal as to "the effect of his discharge in bankruptcy, in bar of the demand preferred against him" in this cause, that the cause ought to be reheard upon that single point before a full court; but the court was of opinion that the case ought not to be reheard upon any other point arising in the cause. Therefore it was ordered that a rehearing be granted upon the said first-named point as aforesaid, but that the petitions for rehearing be denied in all other respects.

And at another day, to wit, at a supreme court of appeals of Virginia, held on the 13 day of April, 1875, this cause was fully reheard
174 upon the question of the effect of the discharge in bankruptcy of the appellee Neal, in bar of the demand against him upon the transcript of the record of the decree aforesaid and the arguments of counsel; but because the court was not then advised of its decree to be pronounced on said question, time was taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on the same day and year first herein mentioned, to wit, Friday, the thirtieth day of April, 1875:

LANGHORNE SCRUGGS AND MANSEL T. Smith, ex'ors of Richard Jones, dec'd, appellants,

against

W'M T. CLARK, JOHN W. HOLLAND, CADDIS B. Luck, and Martha V., his wife, Edm'd Fitzgerald, formerly ex'or of W'm Fitzgerald, dec'd, Jno. W. M. Kinsey and George C. Brown, assignees in bankruptcy of Griffith D. Neal, Coalman D. Bennett, late sheriff of Pittsylvania, and as such adm'or de bonis non with the will annexed of W'm Fitzgerald, dec'd, Griffith D. Neal, E. Barksdale, j'r, John E. Kennedy, adm'or with the will annexed of Raleigh White, dec'd, and Martha W. Fitzgerald, an infant, by J. L. Hurt, her guardian ad litem, appellees.

Upon an appeal from a decree pronounced by the circuit court of Pittsylvania County, on the 7 day of June, 1871.

175 This day came again, as well the appellants as the appellee, Neal, by their counsel, and the court having maturely reconsidered the question of the effect of the discharge in bankruptcy of the said appellee, Neal, in bar of the demand against him in this cause, and the arguments of counsel on such rehearing, is of opinion, for reasons stated in writing and filed with the record, that the demand recovered against the said Griffith D. Neal, by the decree appealed from in this cause, is a debt created by the fraud of the said Neal within the meaning of the 33d section of the act of Congress, approved March 2nd, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and that the said debt is not discharged under the said act: Therefore it is decreed and ordered that the said decree appealed from, and the decree rendered by this court on the 7 day of January, 1875, be

both affirmed upon the point as to the effect of the discharge of the said Neal in bankruptcy, in bar of the demand preferred against him in this cause, on which point a rehearing was granted by an order made
176 in this cause on the 15 day of February, 1875, which, together with the decree and order of this court above mentioned, is ordered to be certified to the said circuit court of Pittsylvania County.

The reasons, in writing, for the opinion of the court on the rehearing of this cause, as stated in the foregoing order, are in the words and figures following, to wit:

Opinion on rehearing.

This case now comes up for decision on a rehearing granted on a single point, viz: as to the effect of the discharge in bankruptcy of Griffith D. Neal, in bar of the demand preferred against him in this cause. It has been ingeniously and elaborately argued by counsel, and my opinion upon it, in addition to what is said on the same subject in the opinion of the court already delivered in the case, is as follows:

Neal was decreed to be liable for the demand on the ground that he fraudulently participated in a devastavit committed by Edmund Fitzgerald, executor of William Fitzgerald, in the sale of certain bonds due to the said testator's estate, & payable to the said executor as
177 such, which bonds were purchased of the said ex'or by the said Neal at a heavy discount, not warranted by any emergency of the estate, the proceeds of which discount were converted and applied by the said ex'or to his own use.

The only ground on which a purchaser can be made liable in such a case, according to the authorities referred to in the said opinion, is that of fraud. By fraudulently participating in the devastavit of an executor, he commits a fraud which makes him liable for the value of the wasted assets to those who are injured by the waste.

Neal has been declared a bankrupt, & has received a certificate of discharge in bankruptcy, which, he contends, entitles him to protection from this demand.

On the other side, it is contended that this case comes within the 33d section of the act of bankruptcy of 1867, which provides "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." The debt in this case
178 having been created by the fraud, & only by the fraud, of the bankrupt, it is contended that the case comes within the literal terms of the act of Congress.

In reply to this view, it is contended in behalf of Neal, that though the debt was created literally by the fraud of the bankrupt, yet it was not such a fraud as the act of Congress contemplates. It was only an implied or constructive fraud, & not an express or actual fraud, which latter alone, it is contended, is within the contemplation of the act.

For this court so to construe the act would be, I think, to take too great a liberty with its language, & would be judicial legislation. There is nothing in the act to warrant such a limitation of the meaning of a plain word, which Congress did not see fit to limit in terms, as it might easily have done, & no doubt would have done, if it had intended to use the word in a limited sense. Having used the word generally, I think it ought to be construed in its general sense, & as embracing both actual & constructive fraud. They belong to the same family, &
179 differ only in degree. They both possess one common feature of

criminality or culpability. It could not have been contemplated that the court should, in every case, have to enquire into & ascertain the degree of the fraud, in order to determine whether it comes within the meaning of the 33d section of the act of bankruptcy. Congress would have said "actual fraud," if it had so intended, in contradistinction to "constructive fraud;" but it seems not to have contemplated any such distinction or classification.

It is argued by the learned counsel for Neal, that because the words "while acting in any fiduciary character," in the said section, have been construed not to include an implied or constructive trust, therefore the word "fraud," in the same section, should be construed not to include an implied or constructive fraud. But this, I think, is plainly a non sequitur.

The words, "while acting in any fiduciary character," or "capacity," occurred in the bankrupt act of 1841, & there they followed certain enumerated cases of trust. They were, therefore, construed as
180 intended to be confined to trusts of a like description with those expressly enumerated in the same connection. That construction was well settled while that act was still in force. In the act of 1867, the general words, "while acting in any fiduciary character," were retained without repeating all the specific enumerations of trust which had preceded those words in the act of 1841; such as "executor," "administrator," "guardian," or "trustee." The general words having received a settled construction, which made them embrace the said specific enumerations, & at the same time exclude cases of implied or constructive trust, it was considered sufficient to use them alone in the act of 1867, and under that act they have received the same construction which they had received under the act of 1841. They brought that same meaning along with them into the new act, although they did not bring also with them all their old associates.

I have examined the cases referred to by the counsel in support of his argument, except one or two to which I could not obtain access, & they fully confirm my view of the case.

181 In Chapman v. Forsyth, &c., 2 How., 202, decided by the Supreme Court of the United States in January, 1844. The case arose under the act of 1841, & M'r Justice McLean delivered the opinion of the Court. It was held that a factor who receives the money of his principal is not a fiduciary within the meaning of the act. "If the act embraces such a debt," said the court, "it will be difficult to limit such an application. It must include all debts arising from agencies; &, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality & integrity of the debtor, & a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special trusts, & the 'other fiduciary capac-
182 ity' mentioned must mean the same class of trusts. The act speaks of technical trusts & not those which the law implies from the contract. A factor is not therefore within the act."

In Williamson v. Dickens, 5 Iredell's L. R., 259, decided by the supreme court of North Carolina in Dec'r, 1844, the same year in which was decided the case just referred to, the case also arose under the act of 1841, & the opinion of the court was delivered by Nash, J. It was

held the words "fiduciary character" in the act extend only to special trusts, & not implied trusts, such as those of agents, factors, &c. "What," said the judge, "is the fiduciary character or capacity embraced by the act? Does it extend to all cases in which money has been received to the use of another? If so, few debts would be left on which the law would operate; for in all such cases the money is received in faith or trust to be paid over; in other words, in a fiduciary capacity. Surely, it could not have been the intention of the national legislature, in passing an act with a view to the relief of bankrupt debtors,
183 so to restrict its operation. But the act shows us itself what was meant in the use of the words 'other fiduciary capacity.' Taken in connection with the words preceding them, it is evident that only such trusts were meant as are special, & not simply implied, as 'the defalcation of a public officer,' or 'executor,' or 'administrator.' Upon the principal, then, of redendo singula in singulis, the words 'other fiduciary capacity' must refer to trusts of the same class, to wit, special & not implied trusts."

These are the only cases to which we are referred arising under the act of 1841. We are referred to several arising under the act of 1867.

In Cronan v. Cotting, 104 Mass. Rep., 245, decided by the supreme court of that State in March, 1870, the case arose under the act of 1867, & Wells, J., delivered the opinion of the court. It was held that the phrase "fiduciary character" in the act does not include the obligation of a creditor to whom the debtor delivered property with the directions to sell it & apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, and to pay over to the
184 debtor a balance of the proceeds of the sale remaining after such satisfaction, but, it seems, implies a fiduciary relation existing previously to or independently of the particular transaction from which the excepted debt arises. "If the phrase 'while acting,' &c., said the court, "be referred to that which immediately precedes, it implies something in the nature of defalcations. If it be referred to the first branch of the provision, its association with fraud & embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or at least breach of trust. The debt in this case arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non-payment of the balance due to the plaintiff after satisfying the purpose of the pledge." "It is simply a debt by contract, like any other which results from the rightful possession of money that belongs to another. We are of the opinion, therefore, that this debt
185 does not come within the meaning of the clause of the bankrupt act above quoted." The court then referred to the construction which had been put by the Supreme Court of the United States on the same words used in the act of 1841, and concluded that this provision of the act of 1867 was framed in view of & with the intent to adopt the same construction.

In Jones, &c., v. Knox, 46 Ala. Rep., 53, decided in 1871, it was held, among other things, that the liability of the surety of a guardian is not of a fiduciary character from which the discharge in bankruptcy of the surety does not release. The judge, in his opinion in this case, uses this language, which is quoted in the argument of the counsel for Neal, & on account of which, no doubt, the case is referred to: "The exception from discharge, under the 33d section of the law, of debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as

a public officer, or while acting in any fiduciary character, from its very comprehensiveness, conveys, as a reason for the exception, the idea of some moral turpitude or culpable neglect of duty." "The sure-
186 ties of a guardian," proceeds the judge, "have no control of his conduct. Their obligation is entirely different from his. They undertake to pay money on his account, while he, in addition, engages to be honest & faithful & careful. It is for failure in this latter respect that the law refuses to release him from his debt. The liability of the sureties was not of a fiduciary character."

In Flanagan v. Cary, 37 Texas, 67, decided in 1872–'3, the case was this: On a replevin-bond for certain slaves claimed by heirs adversely to L. & wife, F. became surety for L. & wife, & from them obtained possession of the slaves as an indemnity against his liability on the bond. Pending the litigation between the heirs & L. & wife, F. retained the possession and use of the slaves, & in the mean time purchased from two of the heirs their undivided interests in the slaves. The heirs recovered judgment against L. & wife for the slaves, & demanded them from F., who refused to surrender them, except upon terms not conceded by them; & they then (in January, 1865) sued F. for the value and hires of the slaves. This suit was protracted until the enactment of the bankrupt-law of 1867, under which F. obtained a discharge from his
187 debts, and pleaded the same in bar of the suit. It was held that though F. may have been indebted to the plaintiffs for their proportion of the hires of the slaves which accrued prior to emancipation, yet his indebtedness was not tortious or fraudulent within the meaning of the 33d section of the bankrupt-act, & therefore his discharge was a bar to the action. "We see nothing in the possession of these slaves on the part of the appellant," said Walker, J., "which can be regarded as tortious or fraudulent. His possession of the slaves, after his purchase of an interest in them, was that of one tenant in common. He was liable to his co-tenants for their share of the rents, issues, & profits of these slaves, & incurred a debt to them which might have been proved under the bankrupt-law." "To bring a case within the rule of fraud, as provided in section 33 of the general bankrupt-law, it is well stated in re Whitehouse, 4 B. R., 15, that where the record of the action shows a material & traversable allegation of frauds as its sole foundation, the demand or debt may be said to be one founded in fraud. The liability of the appellant for the hire of the slaves did not depend upon good or bad faith."
188 I have noticed all the cases referred to which are accessible to me, & they are all cases mainly, if not entirely, in regard to the construction of the words "while acting in a fiduciary capacity," showing little or no reference to the construction of the word "fraud" in the bankrupt-act. Certainly the construction of that word is not directly involved in any of the cases, & it is very clear that not one of them was considered to be a case of fraud, while it was contended in regard to each one of them that it was a case coming within the words "while acting in a fiduciary capacity" in the meaning of the act. These cases, therefore, can have little or no application to the question we are now considering, as to the true construction of the word "fraud" in the act.

The words "no debt created by the fraud or embezzlement of the bankrupt" were not in the act of 1841, but were introduced for the first time into the act of 1867; and therefore it is that we have few or no decisions in regard to the construction of those words, if, indeed, there be any room for construing them. There is a case referred to in 37 Texas, 67, 72, supra, (in re Whitehouse, 4 B. R., 15,) in which it

189 is said to be stated, as before mentioned, "that where the record of the action shows a material & traversable allegation of fraud as its sole foundation, the demand or debt may be said to be one founded in fraud." This is the only reference I have seen to any case in regard to the meaning of that word in the act, & I have not access to the book containing it. But if that case does not tend to show that the fraud in the case now under consideration comes within the meaning of section 33 of the act of 1867, I think it certainly does not tend to show the contrary.

But without referring to any other authorities, I will again refer to one which is a binding authority, & is conclusive of this case in all its aspects. I mean Pinckard v. Woods, &c., 8 Gratt., 140. That was a unanimous decision of this court; Cabell, P., being absent. It is, in all its material features, as much like this case as one case can well be like another. Baldwin, J., delivered the opinion of the court. It is so strong, short, & to the point, that I cannot do better than again to repeat some portions of it. "It is the duty of an executor," he said, "not to sell, but to collect the debts due to the estate of his testator,
190 including those arising out of sales of goods made by the executor in the course of his administration; & if he sells such debts at a price below their value, he thereby commits a devastavit, unless he makes it appear that such a sale was manifestly required by the interests of the estate. And this he can never do without showing, in the first place, that the proceeds thereof have been applied to the purposes of the estate. The appropriation by the executor of the proceeds of such a sale to his own individual uses presents the case of a fraudulent breach of trust on his part, for which, of course, he is personally liable to creditors, legatees, & others, injuriously affected by such improper diversion of the assets. And the purchaser himself, so acquiring such debt as a profit, if he has reason to believe at the time that the same belongs to the estate, & is so disposed of by the executor for his individual uses, thereby concurs in such fraudulent breach of trust by the executor, & therefore incurs the like liability.

"In this case the bonds purchased by the appellant from Newbill, the adm'or with the will annexed of Mary Crafton, dec'd, were
191 executed by the obligors for the prices of certain slaves belonging to her estate, & sold by the adm'or under the authority of her will; which bonds are on their face payable to Newbill in his character of adm'or. The appellant had therefore the best reason to believe that the bonds belonged to the testatrix's estate when he purchased them from the adm'or at a discount of 18 or 20 per cent.; & from the profit he was thus allowed, he had good reason to believe that the adm'or was selling them for his own individual uses; a fact which the result & the condition of the estate have abundantly shewn. Under these circumstances it was incumbent upon the appellant to stay his hand until he should ascertain, by the requisite enquiries, that the sale was to be made for the purposes of the estate, & the sacrifice to be incurred indispensably necessary to prevent some still greater sacrifice. He must have known that it was not in the usual course of administration for an executor to sell debts due the estate at a sacrifice, & he was bound to know that such a sale cannot be tolerated unless under very peculiar emergencies of the estate. If he had made the enquiry
192 he would have ascertained that the condition of the estate did not require the sale of the bonds.

"It is no valid defence for the appellant that at the time he purchased the bonds, it was his belief, & that of the public generally, that

the adm'or was then in solvent circumstances. Such belief may have induced him to look to the individual responsibility of the adm'or, as a guarantee against the failure of his speculations, & to that responsibility he must still look, & its having proved abortive furnishes no reason for throwing the consequent loss upon those whom he has aggrieved by his intermeddling with the affairs of the estate, from no other motive than the desire of gain to himself, & careless as to its effects upon the rights of others.

"Nor does the statute of limitations afford protection to the appellant, for the appellees have no remedy but in equity, which will not allow its application to such a case as this." What was said of Pinckard in that case might as well be said of Neal in this. It might well be said to him, "nomine mutato, de te fabula narratur." If the learned judge had been writing an opinion in this case instead of that, he would have
193 used almost identically the same language that he used in that. The case is an express authority to show not only that Neal participated in the devastavit & concurred in the fraudulent breach of trust committed by the executor, Fitzgerald, & therefore incurred the like liability, but also that he thereby committed a fraud within the meaning of the 33d section of the bankrupt act of 1867. And by the express terms of the act, "no debt created by the fraud of the bankrupt shall be discharged under this act." If that be not a fraud in the meaning of the section, I know not what would be. If it be said for Neal that at the time he purchased the bonds, it was his belief & that of the public generally that the adm'or was then in solvent circumstances, & that a loss to the estate by his future insolvency was not apprehended, the same was said of the appellant in Pinckard v. Woods, and the same answer may be given here that was given there: "It is no valid defence," &c. If it be said for Neal that he was informed & believed that the estate was indebted to the adm'or, who had, therefore, a right to sell on his own account, it may be answered, as was said in that case, that it was
194 the duty of Neal before he purchased of the ex'or bonds payable to him, as such, at a ruinous sacrifice, to have staid his hand & made inquiry, by which he would easily have ascertained that the ex'or was in debt to the estate, and intended to convert the bonds to his own use. If the unfounded belief of Neal, who did not choose to make the proper inquiries to inform himself of the facts, can have the effect to palliate his moral offence, it cannot relieve him of the legal consequences of the fraud of which he is plainly guilty. If there be any error in the opinion heretofore delivered by the court in this cause, it is only in calling the fraud a constructive instead of an actual fraud; but surely that is not an error to the prejudice of Neal, who cannot, therefore, justly complain of it.

I am of opinion that it is a fraud within the meaning of the 33d section of the bankrupt-act, &, therefore, that the decree heretofore rendered by this court against him should be affirmed.

195 STATE OF VIRGINIA,
City of Richmond, to wit:

I George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record of the cause lately depending in the said court by the short style of Jones' executors against Clark and others.

In testimony whereof I hereunto subscribe my name and annex the seal of the said supreme court of appeals, at Richmond, this 11 day of June, in the year one thousand eight hundred and seventy-five.

[SEAL.] GEORGE L. CHRISTIAN, *C'k.*

196 To the Hon. M. R. Waite, Chief-Justice of the Supreme Court of the United States:

Your petitioner, G. D. Neal, a citizen of the State of Virginia, is aggrieved by a final decree of the supreme court of appeals of the State of Virginia, pronounced on the 13 day of April, 1875, in a suit then pending in said court under the style of Jones' ex'ors against Clark & others. A transcript of the record in said suit is herewith presented.

It will be seen that the record presents the following case:

Edmund Fitzgerald, qualified as executor of his brother, William Fitzgerald, on the 21st Sept., 1857. The will clothed him with ample powers, (page 11.) He sold the real estate, taking bonds for the purchase-money, to the extent of $8,275. On the 12 June, 1859, he sold to your petitioner two of these bonds, one for $1,000, due 18 Nov., 1859, & one for $2,293, due 18 Nov., 1860, both bearing interest from 18 Nov., 1858. Your petitioner paid the ex'or in cash for these bonds, $2,780, & soon after sold them to Richard Jones for $3,056. Jones brought suit on the bonds when due, & collected the money. Your petitioner
197 made a profit of $276. At the time of the purchase the ex'or was a man of large property & undoubted solvency, & remained so until 1862, when he was rendered insolvent by the effects of the war. He stated to your petitioner, as a reason for selling the bonds, that he was in advance to the estate. His account, settled by a com'r of the probate court, showed a balance due to him from the estate of $765.41, (page 19.) In May, 1861, the ex'or was required to give a new bond, and then it was that Clark & Holland became his sureties.

In 1867 the accounts of the executor were restated, & a large balance was reported against him. Clark & Holland were sued for this balance, and in 1869, ten years after the sale of the bonds aforesaid, they instituted this suit against your petitioner and against Richard Jones, to recover the amount of said bonds. The circuit court of Pittsylvania decreed that your petitioner & Jones were both liable for the amount of the bonds. The supreme court of appeals of V'a reversed this decree as to Jones, but sustained it as to your petitioner.

The ground of the claim was, that by thus dealing with the assets
198 your petitioner assisted the ex'or to commit a devastavit. Your petitioner became & was regularly adjudicated a bankrupt, and secured his formal discharge in bankruptcy on the 11 February, 1869. (See p. 108 of record.)

He pleaded this discharge in bar of the debt. The supreme court of appeals held that though no actual fraud was proved, yet according to the authorities your petitioner had been guilty of constructive fraud; that by the 33 section of the bankrupt act it is provided that no debt enacted by the fraud of the bankrupt is to be discharged by the act, and therefore that the discharge aforesaid was inoperative, so far as this claim is concerned.

Your petitioner prays especial reference to the opinion of the court at pages 136–8 & pages 150 of the record, at which will be found a statement by the court of the facts of the case, and of the inferences drawn from the facts. It will be seen that your petitioner is exonerated by the court from actual fraud, or intended fraud, and that he is found guilty of a purely technical constructive fraud. Your petitioner humbly represents that there is no single fact in the record from which such a conclusion can legitimately be drawn. The utmost that
199 can successfully be maintained would be that, by his action in the premises, he had placed himself in the position of a constructive

trustee, liable as such to make good the amount of the bonds if the ex'or failed to do so. It will thus be seen that in said suit was brought in question the proper construction of the 33rd section of the bankrupt act of the United States, and also the question as to the extent & validity of the discharge granted to your petitioner under said act. Your petitioner humbly claims, that even if he be held to be guilty of a constructive fraud, as was found by the supreme court of appeals of V'a, that such constructive fraud is not within the purview or meaning or proper construction of the word "fraud," as used in the 33rd section aforesaid; that the fraud meant by the act implies something of bad faith, immorality, and turpitude.

Your petitioner refers to the following authorities: Chapman vs. Forsyth, 2 Howard, 202; Williamson vs. Dickens, 5 Iredell, 263; Cronan vs. Cotting, 104 Mass., 245; Jones vs. Knox, 46 Ala., 60; Flannagan vs. Cary, 37 Texas, 67; Grover & Baker vs. Clinton, 8 B. R., 312;
200 DeConch vs. Saveteer, 3 Johnson Dig., 190.

Your petitioner assigns the following errors in said decree:

1. That the supreme court of appeals of V'a decreed that your petitioner was liable for the amount of the bonds aforesaid, or of any part of them, by reason of his purchase, & by reason of the devastavit committed by the ex'or.

2. That the said court decreed that the discharge in bankruptcy, granted to your petitioner on the 11 Feb'y, 1869, did not discharge him from the claim asserted by the pl't'ffs in said suit.

For these, and for other errors in said record, your petitioner prays for a writ of error & appeal from said decree, & that the same be reversed.

G. D. NEAL,
By OULD HARRINGTON,
His Counsel.

201 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Langhorne Scruggs & Mansel T. Smith, executors of Richard Jones, deceased, appellants, and William T. Clark, John W. Holland, Caddis B. Luck, and Martha V., his wife, Edmond Fitzgerald, formerly executor of William Fitzgerald, deceased, Jno. W. M. Kinsey & George C. Brown, assignees in bankruptcy of Griffith D. Neal, Coalman D. Bennett, late sheriff of Pittsylvania and as such administrator de bonis non, with the will annexed of William Fitzgerald, deceased, Griffith D. Neal, E. Barksdale, junior, John E. Kennedy, adm'r, with the will annexed of Raleigh White, dec'd, and Martha W. Fitzgerald, an infant, by J. L. Hurt, her guardian ad litem, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
202 was in favor of such their validity; or wherein was drawn in ques-

tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Griffith D. Neal, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by Sam. F. Miller, Assoc'ate Jud'e Sup. Cou't U. S., July 12, 1875.

1875, Aug. 5.—A copy of the within writ, together with the bond given for the prosecution of the same, was this day filed in the cl'k's office of the supreme court of appeals of V'a.

GEO. L. CHRISTIAN, *C.*

203 THE UNITED STATES OF AMERICA:

To Langhorne Scruggs and Mansel T. Smith, executors of Richard Jones, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Griffith D. Neal is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 12th day of July, in the year of our Lord one thousand eight hundred and seventy-five.

SAM. F. MILLER.

204 On this ninth day of August, in the year of our Lord one thousand eight hundred and seventy-five, personally appeared John R. Brown, before me, the subscriber, W. W. Lucke, a notary public in and for the county of Pittsylvania, State of Virginia, and makes oath

that he delivered a true copy of the within citation to James M. Whittle, esq., counsel for W'm T. Clark and John W. Holland.

JOHN R. BROWN.

Sworn to and subscribed the ninth day of August, A. D. 1875, before me; given under my hand & notarial seal.

[SEAL.] W. W. LUCKE, *N. P.*

Fe*se*, $1.00; paid by D. G. Neal.

Service acknowledged for L. Scruggs & M. T. Smith, ex'ors of Richard Jones.

Aug. 3, '75.

AULD HARRINGTON,
Att'ys for above parties.

Service acknowledged for C. B. Luck, & Martha, his wife, and Martha W. Fitzgerald.

August 9, 1875.

W'M M. TREDWAY, J'R,
Att'y for above parties.

205 Know all men by these presents that we, G. D. Neal, W'm M. Tredway, j'r, R. W. Martin, L. Scruggs, and J. P. Hunt, are held and firmly bound unto W'm T. Clark, John W. Holland, Caddis B. Luck, and Martha V., his wife, and Martha W. Fitzgerald, in the full and just sum of five hundred ($500) dollars, current money, to be paid to the said W'm T. Clark, John W. Holland, Caddis B. Luck, and Martha V., his wife, and Martha W. Fitzgerald, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a supreme court of appeals of the State of Virginia, in a suit depending in said court between Langhorne Scruggs & Mansel T. Smith, ex'c'rs of Richard Jones, deceased, appellants, and William T. Clark, John W. Holland, Caddis B. Luck, and others, appellees, a decree was rendered against the said appellees, and one of the said appellees, to wit, Griffith D. Neal, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said appellants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such, that if the said Griffith D. Neal shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed)	GRIFFITH D. NEAL.	[L. S.]
"	W'M M. TREDWAY, J'R.	[L. S.]
"	R. W. MARTIN.	[L. S.]
"	L. SCRUGGS.	[L. S.]
"	JOHN P. HUNT.	[L. S.]

Approved by—
(Signed)

SAM. F. MILLER,
Associate Jus. Sup. Court.

206 STATE OF VIRGINIA,
Pittsylvania County, sct:

I. W. W. Lucke, a notary public in and for the county aforesaid, do certify that W. M. Tredway, j'r, R. W. Martin, L. Scruggs, & J. P. Hunt, securities on a bond executed by Griffith D. Neal, dated 24th day of July, 1875, in the penalty of five hundred dollars, conditioned for his prosecuting, with effect, a writ of error granted him from a decree of the supreme court of appeals of V'a, by a justice of the Supreme Court of the United States, and made under oath that they are severally worth at least the sum of $500, after the payment of their own debts & those for which they are bound, which they expect to have to pay; and I certify that I am personally acquainted with said sureties, and that I verily believe that said bond is amply good & sufficient and that the security thereon is ample.

Given under my hand and seal this 26 day of July, 1875.

(Signed)

[SEAL] W. W. LUCKE,
Notary Public.

I further certify that no U. S. com'r resides at this place, Chatham, Virginia.

(Signed) W. W. LUCKE, *N. P.*

No. 580. Neal vs. Scruggs & al. Filed 10 September, 1875. Aug. 5th, 1875. The orginal bonds of which this is a copy, was this day filed in the cl'k's office of the supreme court of appeals of V'a.

GEO. L. CHRISTIAN, *C.*

(Indorsement on cover:) No. 127. Griffith D. Neal, plaintiff in error, vs. Langhorne Scruggs and Mansel T. Smith, ex'ors of Richard Jones deceased. Virginia sup. c't of appeals. Filed 21st September, 1875.

Supreme Court of the United States.

GRIFFITH NEALE
vs.
SCRAGGS et al.

Brief of P. PHILLIPS

for Plaintiff in Error.

This is a bill filed in the State Court of Virginia by Clark and Holland against Neale, Jones, *et al.* The material averments are, that one William Fitzgerald died in 1857, appointing by his will Edmund Fitzgerald as his executor, who qualified, with Smith and Bradley, as his sureties, and that the complainants subsequently joined in a new bond as sureties in the sum of $34,000.

That proceedings have been commenced by certain beneficiaries under the will against the said executor, and to this suit your orators are made parties.

That the executor had sold the lands of the testator as directed by the will, and had received payment in the bonds of the purchaser.

That two of these bonds, to wit, one for $1,000 and the other for $2,293, were sold by him to the (plaintiff in error) Neale "at a discount greatly beyond six per cent., and that Neale subsequently sold them to one Jones at a rate beyond six per cent."

It is then charged that, by reason of the premises, the executor has committed a devastavit in the disposal of

these bonds, in which Neale and Jones have participated, and, in consequence of this participation they are responsible to your orators for the amount of the bonds so purchased, and they are entitled to be substituted to the rights of the legatees and devisees under the will, &c., &c.

The prayer is, that any decree that may be rendered against orators, as sureties in the suit, by the legatee and devisee, may compel the said Jones and Neale to its payment "to the extent of any amount of the testator's assets which they have illegally acquired, as aforesaid." (p. 8.)

The answer of Neale admits the purchase of the two bonds for $513 less than their amounts, and that he sold to Jones the $1,000 bond for $980, and for the bond for $2,293 he received $2,076.

It avers that the respondent knew the executor was a man of very considerable estate, and did not doubt he was acting properly. He knew nothing of the condidion of the estate of the testator, or whether the executor was in advance to it or not.

The answer then sets up his discharge in bankruptcy on 25 January, 1868. (p. 74.)

The complainants took the depositions of Neale, which fully sustains the averment of his answer.

On his cross-examination he answers to the inquiry; what reason induced the executor to trade the bonds? "I know of no reason, except that he stated to me he was in advance to the estate and wanted to raise money.

Q. Had you any reason to doubt the statement?

A. I had not. p. 89.

On 7 June, 1871, a decree was rendered against Neale and Jones charging them for the devastavit of the executor. p. 84.

There was an appeal to the Supreme Court, where this decree was affirmed as to Neale, but Jones was discharged. The decree thus closes; the reasons for the foregoing are "in the words and figures following, to wit:"

Then comes the opinion setting forth these reasons. p. 104.

After reviewing the authorities the court say: "Neale was not guilty of *actual fraud* in making the purchase, but, according to the cases referred to, he was guilty of constructive fraud, which was sufficient to implicate him as a participant in the devastavit committed by the executor. Nothing but the necessities of the estate could have justified the executor in making the sale unless the bonds had become the property of the executor by his advancements. *To be sure the purchaser did not know the condition of the estate and was informed, and no doubt believed, that the estate was indebted to the executor, and that the sale was made on that account.*" But having made the purchase under the circumstances he made it at his peril, &c. p. 112.

The court then considered the question as to laches and lapse of time.

"The bonds were sold (say they), in 1859. The executor was a man of large property and undoubted solvency, and continued so until his removal from the State in 1862.

It was not until ten years afterwards that any one asserted a liability on the part of the purchase.

The court having arrived at the conclusion that the remedy was not barred, then considers the plea of bankruptcy, which is overruled on the ground that the 33d section of the bankrupt act does not require actual fraud, as the exception to the discharge, but uses the word in a generic sense. p. 114.

A rehearing was had on the single question, as to the effect of the discharge in bankruptcy, when the same ruling was made. p. 120.

Assignment of Error.

This decree of the Supreme Court is now here on writ of error, and the plaintiff in error now assigns for error the decree of the Supreme Court, overruling the plea of the defendant, showing his discharge in bankruptcy, and in rendering the decree against him.

Argument.

The bankrupt act of 1841 exempts from the discharge, debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity."

The act of 1867, 33d section, provides "that no debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act."

The object of the statute was to discharge honest debtors from their liability when misfortune had overtaken them.

Certain exceptions were made founded on principles of public policy, to wit, debts by defalcation as a public officer, or while acting in any fiduciary character.

These exceptions are in both the acts of 1841 and 1867.

In construing the term "fiduciary character," this court has determined that it would not restrict the operation of the act for the relief of bankrupt debtors by holding that it included *implied trusts*. Nothing but an

express trust is declared to be within the legislative intention.

Chapman vs. *Forsyth*, 2 How., 202;
Williamson vs. *Duken*, 5 Iredell, 263.

These cases were under the act of 1841.

The same question under the act of 1867 is answered in the case of *Cronan* vs. *Cutting*, in which the court say:

"It is argued that the deposit of the securities made the defendant trustee for the owner—first, to apply the proceeds, as far as required, to the payment of the debt due the estate of which she was administratrix; second, to return the balance to the depositor, and that this trust constitutes a fiduciary relation, such as the act contemplates.

This would require an interpretation so broad that almost all pecuniary obligations, *especially those implied by law*, would be included in the exemption.

If the phrase "while acting in a fiduciary character" be referred to that which immediately precedes it, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, of a breach of trust."

104 Mass., 245.

The question now is on the interpretation of the words "no debt created by the fraud or embezzlement of the bankrupt" shall be discharged under this act.

In this case the Appellate Court has held—

That the executor had ample powers under the will to dispose of the property;

That the purchaser had no need to inquire whether the condition of the estate required a sale;

That he had a right to assume the sale was rightly made, and was not bound to see to the application of the purchase money;

That he did not know the condition of the estate;

That he was informed, and, no doubt, believed, that the estate was indebted to the executor, and that the sale was made on that account;

That the executor was a man of large property and undoubted solvency until 1862, and was reduced to poverty by the war.

(*The bonds were purchased by Neale in* 1859.)

Notwithstanding all this, they held that Neale, though not guilty of actual fraud, was "guilty of a constructive fraud which was sufficient to implicate him in the devastavit."

The sole facts on which this conclusion is rested are—

First. That the bonds were payable to Fitzgerald, described as executor;

Second. That they were purchased at a greater discount than six per cent.

We submit it was never the intention of the act to withhold its benefit from the bankrupt under these circumstances.

The "fraud or embezzlement" described by the act refers to transactions involving criminal intent and wilful wrong-doing.

We understand perfectly what is meant by "embezzlement."

The object of statutes in relation thereto is to embrace as criminal offences, punishable by law, certain cases where, *although the moral guilt was quite as great as in lar-*

ceny, yet the technical objection arising from the fact of possession lawfully acquired by the party screened him from punishment. They were, therefore, declared *crimes* punishable by law.

Comm. vs. *Simpson*, 9 Met., 192.

The association of the word "fraud" with that of "embezzlement" fully justifies the conclusion that the legislature intended by the use of the former to indicate a transaction involving *moral turpitude.*

To deprive the party of the benefit of his discharge when he has been guilty of no moral wrong, upon the ground that he has subjected himself to a technical devastavit, is to antagonize the intent of the act, which is to liberate unfortunate debtors who in good faith surrender their property to creditors.

The decision places Neale in the same position he would occupy on proof that he had combined with the executor to defraud the estate.

But Neale was not guilty even of a *constructive* fraud.

The executor had the power to sell. The purchaser believed the sale was for a legitimate purpose.

He was informed and believed that the estate was indebted to him.

He knew that the executor was a man of large means and undoubted solvency.

The purchase, under these circumstances, could not subject Neale to the charge of fraud, actual or constructive within the meaning of the bankrupt act.

Whether, he might not be held in equity to account, as under a constructive or implied trust, is a wholly different question.

Chancellor KENT reviews the decisions on the subject of purchases from executors, and cites *Nugent* vs. *Griffin*, in which Lord Hardwick holds that he would not

permit creditors or legatees to follow assetts into the hands of a pur chaser unless there was evidence of fraud or collusion between them. He cites also *Meade* vs. *Lord Orrery*, in which it was declared by the Chancellor that there was no instance where the assignment had been made by an executor for valuable consideration that chancery had set it aside, unless some fraud appeared between the executor and the assignee. The knowledge in the third person that the assignment was made by the executor of *property which he held as assetts, did not alter the case.*

Field vs. *Sheffelin*, 7 John Chan., 152.

But admit that the purchase, under the circumstances, though fairly made, was subject to the risk that Fitzgerald, the executor, should properly account.

The purchase was made in 1859. The executor was entirely solvent until 1862.

The discharge in bankruptcy was in 1868.

And this suit is brought not by a legatee or creditor, but by parties who, as sureties, were themselves responsible for the good faith of the executor ten years after the executor had become insolvent.

If the transaction between the executor and Neale subjected Neale to account for the proceeds of these bonds, then there was a debt which was provable in the bankruptcy proceding and is covered by the discharge.

We insist that actual fraud can alone deprive the discharge of its full effect.

In *Mitchell* vs. *Warden* it is said:

"It does not appear that R. & Co., in purchasing the goods, made any representation of their ability to pay

for them. If, however, they concealed the fact of their insolvency, with the *design of procuring the goods without paying for them*, it was a fraud. On the trial of such an issue, the *quo animo of the transaction is the fact to be arrived at.*"

20 Barb., 253.

Express representations of ability to pay, which induced the credit, will be evidence of an intended fraud. But these representations must not only be false, but known to the party making them to be so.

Freeman vs. *Leland*, 2 Abbott Rep., 479.

Wenrer vs. *Debaum*, 1 E. D. Smith, 261.

Gaffney vs. *Barton*, 12 How'd Prac. Rep., 518.

The argument of the court below is, "Certainly, if the purchaser had actually colluded with the executor to commit a devastavit, his fraud would have come within the meaning of the act. Why does it not come within the meaning when he has so dealt with the executor in regard to the assets of his testator as to make him liable upon the ground of his having been guilty of an implied or constructive fraud? It has precisely the same effect with actual fraud, in regard to the measure of his liability; why has it not the same effect with actual fraud in regard to his discharge in bankruptcy?"

The answer to this has been already given: A mere liability or indebtedness, having no element of bad faith, immorality, craft, or cheating, though enforceable against the debtor, is not within the exception of the statute.

It is a *non sequitur* to say that because Neale could be made liable in this proceeding, therefore this liability is excepted by the statute.

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for Plaintiff in Error.